79-1027

Supreme Court, U. S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

EDWARD J. KING,
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Appellants

v.

PRETERM, INC.,

Appellees

On Appeal from the United States Court
of Appeals for the First Circuit

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Governor of the Commonwealth of Massachusetts, its Secretary of Administration and Finance, its Secretary of Human Services, and its Commissioner of Public Welfare (the state officials) submit this statement in support of their appeal from a final decision and order of the United States Court of Appeals for the First Circuit holding two state statutes governing the reimbursement of costs related to the performance of abortions under the Commonwealth's program of medical assistance to be in conflict with provisions of title XIX of the Social Security Act

and enjoining the statutes' enforcement. The state officials contend that the Court of Appeals's decision incorrectly interprets § 1902(a)(17) of the Act, 42 U.S.C. § 1396a(a)(17) (1976), and that their appeal presents substantial questions concerning the proper relationship between state and federal government within the Social Security Act's "scheme of cooperative federalism." These questions are of such significance that they warrant this Court's plenary consideraton.

Opinions Below

The District Court's original decision enjoining the enforcement of Massachusetts St. 1978, ch. 367, § 2, Item 4402-5000, on a preliminary basis is reported sub nom. Jaffe v. Sharp at 463 F. Supp. 222 (D. Mass. 1978). The District Court's order of September 6, 1978, allowing consolidation of the hearing upon plaintiffs' motions for preliminary injunctions with the merits pursuant to Fed.R.Civ.P. 65(a)(2) and for the entry of a final order is unreported and reproduced in the Appendix. The Court of Appeals's order of August 7, 1978, granting an injunction pending appeal of wider scope than the District Court's preliminary injunction is unreported and reproduced in the Appendix. The Court of Appeals' decision of January

15, 1979, on the merits of the statutory claims is reported at 591 F.2d 121 (1st Cir. 1979), and, pursuant to this Court's rules, is reproduced in the Appendix. Finally, the Court of Appeals' order of August 2, 1979, modifying its judgment entered on January 15, 1979, and its order of August 7, 1978, is unreported and reproduced in the Appendix.

Jurisdiction

The state officials appeal from a series of orders which the Court of Appeals entered at various times during the course of its consideration first of appeals from the District Court's action on plaintiffs' motions for preliminary injunctive relief, then upon final review of the District Court's judgment on plaintiffs' statutory claims, and, finally, upon plaintiffs' request for further relief following the enactment of new legislation.[1/] In

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1/ As a technical matter, the state officials appeal from the Court of Appeals' order of August 2, 1979, which amended its judgment entered January 15, 1978, and its order of August 7, 1978. Since the basis of all of these orders is the same, i.e., the conclusion that the challenged state statutes conflict with the requirements of

(footnote continued)

summary, plaintiffs' complaints in the District Court claimed that the Commonwealth's statutory restrictions on the reimbursement of health care provider costs incurred to provide abortion services to Medicaid recipients are invalid because they conflict with title XIX of the Social Security Act. Asserting jurisdiction under 28 U.S.C. §§1331 and 1343 (1976), plaintiffs sought

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1/ continued

title XIX, and since the court below modified each of its earlier orders on August 2, 1979, the state officials' notice of appeal, reproduced in the Appendix, gives notice of their appeal from all three orders.

One other technical point concerning this Court's jurisdiction deserves mention. While the District Court entered a "final judgment" on September 6, 1978 (reproduced in the Appendix), this judgment does not conform to Fed.R.Civ.P. 54(b)'s provision that:

> the Court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer

(footnote continued)

preliminary injunctive relief against enforcement of the first statute, relief which the District Court granted in part on July 28, 1978. The District Court's opinion is reported at 463 F. Supp. 222 (D. Mass. 1978). Plaintiffs and the state officials appealed to the Court of Appeals both from the preliminary injunction of July 28, 1978, and the District Court's "final judgment" of September 6,

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1/ continued

> than all of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Despite this technical flaw, it is clear that the Court of Appeals and the parties have treated the District Court's judgment on the statutory issues as if it were a final one. This course is consistent with the preferable practice, Hagans v. Levine, 415 U.S. 528 (1974), but it has had the effect of requiring the state officials to note their appeal from the lower court's decision on the statutory claims before the case is fully adjudicated. The continuing nature of the controversy in the District Court, which now concentrates on plaintiffs' constitutional claims, prompted the state officials to apply to the Circuit Justice for leave to postpone filing this jurisdictional statement until the District Court had entered its judgment on the constitutional issues. See

(footnote continued)

1978, and that court filed its opinion and entered an order affirming the District Court's "final judgment" in pertinent part on January 15, 1978. The Court of Appeals' opinion is reported at 591 F.2d 121 (1st Cir. 1979) and is reproduced in the Appendix. The Court of Appeals denied plaintiffs petition for a rehearing on February 2, 1979, and modified its judgment of January 15, 1979, by order of August 2, 1979. Copies of both of these orders are included in the Appendix. The state officials filed their notice of appeal in the Court of Appeals on August 20, 1979, and a copy of this notice is also reproduced in the Appendix.

The state officials have claimed their appeal to this Court pursuant to 28 U.S.C. §1254(2)(1976). Cases which

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1/ continued

Respondents-Appellants' Motion for an Order Permitting Postponement of further Appellate Proceedings until the District Court Enters Final Judgment (Application No. A-323, dated October 3, 1979). While the state officials continue to believe that the most efficient way of proceeding is for this Court to exercise its appellate jurisdiction in this case at one time and as to all issues, they are filing this jurisdictional statement in compliance with the Circuit Justice's order which extended the period of time in which the state officials might file rather than postponing filing until the District Court entered final judgment. See order filed October 16, 1979.

the state officials believe sustain this Court's jurisdiction are Quern v. Zbaraz, 469 F. Supp. 1212 (N.D. Ill. 1979), appeal dock'td 48 U.S.L.W. 3126 (July 2, 1979), juris. post., 48 U.S.L.W. 3356 (Nov. 26, 1979); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977); and Rosado v. Wyman, 397 U.S. 397 (1970).

Statutes Involved

The Court of Appeals determined that two Massachusetts statutes governing the reimbursement of the costs of abortion surgery under the Commonwealth's Medicaid program are invalid because they conflict with provisions of title XIX of the Social Security Act. The first statute, St. 1978, ch. 367, § 2, Item 4402-5000, provides that:

> SECTION 1.
>
> To provide for the maintenance of the several departments, boards, commissions and institutions, of sundry other services, and for certain permanent improvements, and to meet certain requirements of law, the sums set forth in section two, for the several purposes and subject to the conditions specified in

said section two, are hereby appropriated from the General Fund unless specifically designated otherwise in the item, subject to the provisions of law regulating the disbursement of public funds and the approval thereof for the fiscal year ending June thirtieth, nineteen hundred and seventy-nine, in this act referred to as the year nineteen hundred and seventy-nine, or for such period as may be specified.

SECTION 2.

* * *

DEPARTMENT OF PUBLIC WELFARE.

4402-5000

For a medical assistance program;...and provided, further that no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother. This provision does not prohibit payment for medical procedures necessary for the prompt treatment of the victims of forced rape or incest if such rape or incest is reported to a licensed hospital or law enforcement agency within thirty days after said incident....

The second statute is St. 1979, ch. 393:

SECTION 1.

To provide for the maintenance of the several departments, boards, commissions and institutions, of sundry other services, and for certain permanent improvements, and to meet certain requirements of law, the sums set forth in section two, for the several purposes and subject to the conditions specified in said section two, are hereby appropriated from the General Fund unless specifically designated otherwise in the item, subject to the provisions of law regulating the disbursement of public funds and the approval thereof for the fiscal year ending June thirtieth, nineteen hundred and eighty, in this act referred to as the year nineteen hundred and eighty, or for such period as may be specified.

SECTION 2.

* * *

4402-5000

For a medical assistance program;...and provided, further that no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother....

Questions Presented

1. Whether St. 1978, ch. 367, § 2, Item 4402-5000, and St. 1979, ch. 363, § 2, Item 4402-5000, which impose restrictions upon the reimbursement of health care provider costs incurred to provide abortion services to Medicaid recipients, are inconsistent on their face with certain provisions of title XIX of the Social Security Act, 42 U.S.C. § 1396a (1976), and certain regulations promulgated under it.

2. Whether an injunction prohibiting the enforcement of the challenged statutes is proper in light of the voluntary nature of a state's participation in the program of medical assistance authorized by title XIX of the Social Security Act and this Court's decision in Rosado v. Wyman, 397 U.S. 397 (1970).

Statement Of The Case And Summary Of Prior Proceedings

Two separate groups of plaintiffs commenced separate civil actions in the District Court in July, 1978. The first, originally captioned Baird v. Sharp, was filed on July 12, 1978; the second, Preterm v. Dukakis, was filed a day later and assigned as a related case. Although never formerly consolidated in the District Court, these two actions

were heard and decided together. As set forth in the complaints, the various plaintiffs claimed that the Commonwealth's statutory restrictions on the reimbursement of costs incurred by health care providers related to the provision of abortion services to Medicaid recipients are in conflict with provisions of title XIX of the Social Security Act which, plaintiffs maintained, require participating states to reimburse all costs related to the provision of "medically necessary services."[2/] In addition to this primary statutory claim, plaintiffs alleged that the statutes were unconstitutional because they violate the equal protection clause of the Fourteenth Amendment and work an impermissible intrusion upon the physician-patient relationship contrary to the protections afforded Medicaid recipients by the Ninth and Fourteenth Amendments. Plaintiffs' motions for temporary restraining orders became moot as a result of the state officials' determination to delay implementation of the statutory restrictions pending the promulgation of regulations and the notification of Medicaid providers and recipients. The District Court did, however, hold a hearing on plaintiffs' motions for preliminary injunctive relief and, on July 28, 1978, entered an order enjoining the state officials from implementing St. 1978, ch. 367, § 2, to the extent to which it prohibited the

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2/ The Baird plaintiffs sought reimbursement for the costs of "elective" procedures as well.

expenditure of state funds to reimburse participating health care providers for costs related to the performance of abortion surgery and in which federal financial participation was available under the terms of the so-called "Hyde Amendment," Pub. L. 95-205, §101, 91 Stat. 1460 (Dec. 9, 1977). Jaffe v. Sharp, 463 F. Supp. 222, 230 (D. Mass. 1978).[3/] All the plaintiffs and the defendant state

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3/ The "Hyde Amendment" in effect during the proceedings in the District Court, Pub. L. 95-205, § 101, 91 Stat. 1460 (Dec. 9, 1977), is a limitation on appropriations for the Department of Health, Education, and Welfare and provides in pertinent part that:

> provided, That none of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.
>
> Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.
>
> The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced.

officials appealed from the District Court's order. The plaintiffs in Preterm sought an expanded injunction pending appeal, and the Court of Appeals entered an order on August 7, 1978, requiring the state officials to reimburse health care providers participating in the Commonwealth's Medicaid program for costs related to the provision of abortion services provided to "all Medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically-necessary service." Preterm, Inc. v. Dukakis, 591 F.2d 121, 123-24 (1st Cir. 1979). On September 7, 1978, the District Court upon motion consolidated its consideration of plaintiffs' motions for preliminary injunctive relief with the merits and entered its preliminary injunction as a final order. All parties again appealed, and the Court of Appeals ordered an accelerated schedule for briefing and argument. Confining itself, as had the District Court, to the statutory issues, see Hagans v. Levine, 415 U.S. 528 (1974), the Court of Appeals filed its opinion and entered its judgment affirming the Distict Court's order in pertinent part.[4/] Following the Court of

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4/ The District Court had dismissed certain plaintiffs in the Baird v. Sharp proceeding for lack of standing. The Court of Appeals reversed this portion of the District Court's order on procedural grounds. 591 F.2d at 138.

Appeals' decision, the plaintiffs in Parents' Aid Society, Inc. v. Sharp (Baird v. Sharp in the District Court) moved that the court stay the issuance of its mandate and continue its August 7, 1978, injunction pending the filing of a petition for certiorari in this Court. The Court of Appeals granted this motion on January 29, 1979, and denied the Preterm plaintiffs' motion for a rehearing on February 2, 1979. This Court denied the plaintiffs' petitions for certiorari on May 14, 1979, and the Circuit Justice granted the Preterm petitioners' application for suspension of the Court's order denying certiorari on May 18, 1979. The Preterm plaintiffs next filed a motion in the Court of Appeals seeking modification of its injunction pending appeal of August 7, 1978, as continued in effect by its order of January 29, 1979, to enjoin the enforcement of Stat. 1979, ch. 268, § 1, and the Court of Appeals entered an order on June 21, 1979, requiring the state officials to show cause why the relief the Preterm plaintiffs sought should not be granted. The state officials filed their response, and the Court of Appeals then entered another order on July 26, 1979, requesting the state officials to respond to the Preterm plaintiffs' request for further relief against Stat. 1979, ch. 393, § 2, Item 4402-5000. After receiving the state officials' response, the Court of Appeals entered an order on

August 2, 1979, modifying its judgment of January 15, 1979, to enjoin the implementation of Stat. 1979, ch. 393, § 2, Item 4402-5000, "insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment." The Court of Appeals in the same order also amended its order of August 7, 1978, to include Stat. 1979, ch. 393, § 2, Item 4402-5000, within the scope of that earlier order. On August 20, 1979, the state officials filed their notice of appeal from the court's order of August 2, 1979, and its prior orders of January 15, 1979, and August 7, 1978, as modified by the August 2nd order. This Court denied the Preterm plaintiffs' petition for rehearing on their petition for certiorari on October 1, 1979, and the Court of Appeals issued its mandate on October 10, 1979.

Proceedings relating to the statutory claims in this case have now reached a conclusion in the lower courts. While the state officials have sought to postpone further proceedings in this Court pending the disposition of the remaining constitutional claims below, the Court certainly may exercise its appellate jurisdiction at this point, for, as the state officials demonstrate in the following section, the questions which the Court of Appeals' decision presents are of national importance and central to the relationship under the Social Security Act of the federal and state governments.

The Questions Are Substantial

Over the past ten years, this Court and the lower federal courts have frequently been called upon to interpret various provisions of the Social Security Act. On occasion, this Court has also found its necessary to criticize the lower federal courts for approaching their interpretive task in Social Security Act cases more with an eye toward judicial perceptions of social welfare than one focused solely on the intent of Congress. E.g., Quern v. Mandley, 436 U.S. 725, 741 (1978); see Burns v. Alcala, 420 U.S. 575, 580 (1975). The current controversy over title XIX's requirements regarding "medically necessary services," of which this case and similar abortion cases are only one example, demonstrates that this criticism has yet to be fully effective, for common to most decisions involving the "medically necessary" issue is insufficient attention to the complexities of statutory interpretation involved and a continued willingness to substitute judicial policy judgments for those of the Congress and the state and federal officials charged with responsibility for administering the national program of medical assistance which title XIX authorizes. In addition, the lower federal courts tend to neglect this Court's examples of the proper approach to requiring state officials to remedy non-conformities between state plans for public assistance and the Social Security Act's

requirements. The state officials argue in the following paragraphs that the Court of Appeals, while avoiding some of the errors of other lower federal courts in interpreting the requirements of title XIX, improperly concluded in this case that title XIX prohibits the Commonwealth from limiting the availability of reimbursement under its Medicaid program to costs associated with the performance of only certain abortion procedures and that an injunction absolute on its face requiring the reimbursement of all "medically necessary" abortion surgery costs is a proper remedy for the non-conformity of the Commonwealth's state plan. These determinations raise substantial questions which warrant this Court's plenary consideration.

I. THIS COURT SHOULD REVIEW THE DETERMINATION OF THE COURT OF APPEALS THAT THE COMMONWEALTH'S LIMITATIONS ON THE REIMBURSEMENT OF ABORTION COSTS ARE UNREASONABLE AND INCONSISTENT WITH THE OBJECTIVES OF TITLE XIX.

Unlike many of the other lower federal courts which have considered the "medically necessary" issue, the Court of Appeals in this case rejected the argument that title XIX requires participating states to provide reimbursement of all participating health care provider costs incurred to provide "medically necessary" services.

591 F.2d at 124-25. The Court of Appeals' decision on this point is correct, and the state officials do not question it. However, while avoiding the pitfalls which uncritical transpositions of language create,[5/] the Court of Appeals went on to conclude that certain statutory and regulatory provisions governing the amount, duration, and scope of benefits which a state may offer under its Medicaid program prohibit the Commonwealth from imposing the restrictions on abortion cost reimbursement which the challenged statutes were designed to work. In essence, the Court of Appeals concluded on the basis of the extremely limited factual record compiled at the preliminary injunction hearing that "it [is] 'unreasonable' and wholly '[in] consistent with the objectives of the Act', 42 U.S.C. § 1396a(a)(17), for a state to provide abortion services and then, with limited exceptions for victims of rape and incest, deny them to all those who will not die without it [sic]." 591 F.2d at

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5/ The District Court was not as agile and made the mistake of inferring from the phrase "necessary medical services" which appears in title XIX's appropriations section (its "01" section) that the Congress intended to impose an obligation in the statute's "02" section upon the states to reimburse all costs incurred for "medically necessary services." Jaffe v. Sharp, 463 F. Supp. 222, 228-29 (D. Mass. 1978), aff'd on oth'r gr'nds sub nom. Preterm v. Dukakis, 591 F.2d 121, 126-27 (1st Cir. 1979).

126. The explanation of this conclusion is based not upon a close analysis of the legislative history of § 1396a(a)(17) or of HEW's purposes in promulgating its regulation dealing with limitations on benefits (42 C.F.R. § 440.230 (1978)).[6/] Rather, the court below simply expressed its intellectual puzzlement, 591 F.2d at 126, and, without citing any authority whatsoever, concluded that the challenged statute is inconsistent with title XIX's provisions.[7/]

The state officials submit that the Court of Appeals' intuitive reliance upon § 1396a(a)(17) and 42 C.F.R. § 440.230 (1978) is another unfortunate example of a lower federal court's willingness to interpret the Social Security

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6/ Indeed, the Court of Appeals neglected to note that the version of this regulation upon which it relies in its opinion was amended prior to decision precisely because inadvertent alterations in its wording during recodification had led to confusion over its effect upon a state's authority "to decide what medical aasistance will be covered under the State Medicaid plan." 43 F.R. 57253 (Dec. 7, 1978).

7/ The court also concluded that the statute impermissibly circumscribes physician judgment. Again, the court cites no authority for the proposition that a state may not place limits on physician decision-making, even assuming, as the state officials of course do not, that a limitation on Medicaid benefits may be thought to impose a restriction on physician decision-making.

Act on the basis of generalities and imprecise analysis. Without commencing an extensive discussion, the state officials point out that the key provision of § 1396a(a)(17), i.e., its requirement of "reasonable standards... for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this title...," is derived from the Kerr-Mills amendments to title I of the Social Security Act, 74 Stat. 924.[8/] Further, the legislative history of § 1396a(a)(17), both its own and that of its predecessor in Kerr-Mills, provides no support for the Court of Appeals' conclusion.[9/]

8/ Kerr-Mills provided that: "(11)(D) include reasonable standards, consistent with the objectives of this title, for determining eligibility and the extent of such assistance...."

9/ The Senate Finance Committee's comments on the Kerr-Mills provision were as follows:

Medical Assistance for the Aged
Receiving Old-Age Assistance

* * *

3. Eligibility.

Each state has the responsibility of determining the standard of eligibility for the medical care

(footnote continued)

The truly remarkable learning one gains from reviewing § 1396a(a)(17)'s legislative history is that the Congress intended its provisions to deal primarily with

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9/ continued

it provides to aged persons. For aged persons receiving money payments the State must take into consideration any income and resources of the individual.

4. Scope of Medical Services.

There is no federal limitation on medical services provided under the bill. Each state may determine for itself the scope of medical services to be provided in the program.

Medical Assistance for the Aged Not
Receiving Old-Age Assistance
[Medically Needy]

1. Purpose.

* * *

A State would have broad latitude in determining eligibility for benefits under the program as well as the scope and nature of the services to be provided within the limitations described below....

* * *

2. Eligibility.

* * *

(footnote continued)

issues of eligibility, not benefits, for Congress recognized that, under the Act, benefits determinations have always been primarily the states' responsibility. Therefore, the Court of Appeals should have acknowledged that, since the Commonwealth's limitations on abortion

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9/ continued

> The State has wide latitude to establish the standard of need for medical assistance as long as it is a reasonable standard consistent with the objectives of this title....
>
> 3. Scope of Benefits.
>
> The scope of medical benefits and services provided will be determined by the States....

Sen. Rept. No. 1856, reprinted in 2 U.S. Code Cong. & Admin. News 3610-14 (1960) [emphasis supplied].

When Congress enacted title XIX in 1965, it described its intentions concerning § 1396a(a)(17) as follows:

> (d) Determination of need for medical assistance.
>
> The committee bill would make more explicit a provision now in the law that in determining eligibility for and extent of aid under the plan, States must use reasonable standards consistent with the objectives of the titles. Although states may set a limitation on income and resources which individuals may hold and be

(footnote continued)

reimbursement affect benefits, and not eligibility, § 1396a(a)(17) is inapplicable to the "medically necessary" issue.

9/ continued

> eligible for aid, they must do so by maintaining a comparability among the various categorical groups of needy people. Whatever level of financial eligibility the state determines to be that which is applicable to the needy aged, for example, shall be comparable to that which the State sets to determine the eligibility for the needy blind and disabled; and must also have a comparability to the standards used to determine the eligibility of those who are to receive medical assistance as needy children and the parents or relatives caring for them....
> The bill also contains a provision designed to correct one of the weaknesses identified in the medical assistance for the aged program [title I, as amended by Kerr-Mills]. Under the current provisions of Federal Law some States have enacted programs which contain a cutoff point on income which determines the financial eligibility of the individual.... In order that the States shall be flexible in the consideration of an individual's income, the committee requires that the State's standards for determining eligibility for and the extent of medical assistance shall take into account, except to the extent prescribed by the Secretary, the cost...incurred for medical care or any other type of remedial care recognized under State law... [emphasis supplied].

Sen. Rept. No. 404, reprinted in 1 U.S. Code Cong. & Admin. News 1943, 2018-19 (1965).

Similarily, 42 C.F.R. § 440.230 (1978) does not support the judgment below. This regulation imposes only three requirements upon participating states: a state plan for medical assistance must "(a)...specify the amount and duration of each service that it provides"; if a state plan includes a "service," "[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose"; and "[t]he medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition."[10/] 42 C.F.R. § 440.230 (1978), as amended by 43 F.R. 57253 (Dec. 7, 1978). The regulation's first requirement is merely a formal one designed to prescribe the minimal written content of a state plan for medical assistance. The second requirement imposes what is best considered an anti-waste restriction: if a state includes a "service," it must include it to a sufficient extent to assure that the "service" "reasonably achieve[s] its purpose." For example, if a state includes benefits for inpatient hospital services related to the treatment of infectious

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10/ However, a state "agency may place appropriate limits on a service based upon such criteria as medical necessity or on utilization control procedures."

disease, it cannot make these benefits so minimal (say, limited to two days of hospitalization) that few if any patients could be expected to recover from their illness before they would have to be discharged or begin paying for additional hospital stay days themselves. For obvious reasons, such a benefit would have little value to a recipient and might promote highly undesirable provider attitudes, contrary to Congress's explicit desires.

Finally, the third requirement is by its very terms designed solely to prevent states from denying benefits to a specific individual—already otherwise determined to be eligible for medical assistance—because of the individual's particular medical situation. Thus a state may not include a provision in its state plan which purports to authorize a social worker to deny benefits to a Medicaid recipient simply because the recipient needs, say, extensive thoracic surgery entailing a long hospital stay and post-operative recovery in a skilled nursing facility for several months, assuming, of course, that thoracic surgery in general is a "required service" included in the state plan. Simply put, this requirement has no applicability to a state plan provision which properly removes from the list of "services" (or properly limits the availability of) a specific type of surgical service, thus precluding providers of health care services from seeking reimbursement from the state for the cost of any (or

some) such services which they provide to all Medicaid recipients. Such a future-oriented, across-the-board elimination of a "service" from a state plan for medical assistance is in all respects consistent with Congressional intent.

The state officials submit that the Court of Appeals' failure to apprehend Congress's purpose in enacting § 1396a(a)(17) and HEW's intention in promulgating 42 C.F.R. § 440.230 (1978) is a substantial error which, left uncorrected, would significantly and adversely limit the states' discretion to adjust the benefits of their Medicaid programs. Thus, the court's conclusion that these provisions prohibit the Commonwealth from enforcing its challenged statutes presents a substantial question which this Court should consider on the basis of full briefing and oral argument.

II. THIS COURT SHOULD DETERMINE WHETHER THE COURT OF APPEALS ACTED PROPERLY IN AFFIRMING AN ABSOLUTE INJUNCTION RATHER THAN OFFERING THE COMMONWEALTH THE ALTERNATIVES OF EITHER CORRECTING NON-CONFORMITIES OR CEASING TO EXPEND FEDERAL FUNDS.

Both the District Court and the Court of Appeals granted relief in the nature of a permanent injunction against the state officials prohibiting them from

enforcing the challenged statute to the extent to which they are more restrictive than their federal counterpart, the so-called "Hyde Amendment." 591 F.2d at 134; 463 F.Supp at 230. The granting of this type of relief also led the Court of Appeals to inquire whether the state officials had placed themselves in contempt of court, see Appendix, order dated June 21, 1979, by performing their obligations under state law. Although the state officials pointed out to the Court of Appeals that such relief is both inappropriate and unwarranted, the court maintained its position on remedy and extended its original judgment to enjoin the enforcement of more recent state legislation. Appendix, order dated August 2, 1979.

In Rosado v. Wyman, 397 U.S. 397 (1970), this Court had occasion to consider the nature of the remedy which a federal court might grant in a case in which a state plan for public assistance under the Social Security Act was held to conflict with the Act's requirements. Mr. Justice Harlan, writing for the Court, explained that an "unarticulated premise" of any such remedy, given the Social Security Act's operation as a "system of cooperative federalism," is that a state should have "alternative choices of assuming the additional cost of paying benefits [in accordance with federal requirements] or not using federal funds to pay welfare benefits

according to a plan [which is] inconsistent with federal requirements." 397 U.S. at 420-21. Indeed, in Rosado the Court concluded that the substantial nature of New York's non-conformity required remand "to the District Court to fix a date that will afford New York an opportunity to revise its program in accordance with the requirements of § 402(a)(23) if the State wishes to do so. The District Court shall retain jurisdiction to review, taking in to account the views of HEW should it care to offer its recommendations, any revised program adopted by the State, or, should New York chose not to submit a revamped program by the determined date, issue its order restraining the use of federal monies pursuant to the present statute." Id. at 421-22.

The state officials submit that the remedy model prescribed in Rosado is the one which the Court of Appeals should have adopted in this case and that the court should not have upheld, much less enlarged, the District Court's absolute injunction, but rather given the state officials an opportunity to choose between amending state law provisions to permit administration of the Commonwealth's Medicaid program in conformity with federal law or suffer the entry of an injunction prohibiting the further expenditure of federal funds for medical assistance. This distinction in remedy is hardly

one without a difference,[11/] and the state officials are entitled to an order which respects these differences. The Court of Appeals' failure to adopt the Rosado remedy model raises a substantial question of procedure and statutory interpretation which warrants this Court's plenary consideration.

11/ Not only is it unseemly for the Governor of the Commonwealth and other state officials to be threatened with contempt, but there are also basic state and federal law differences between the expenditure of state funds to reimburse health care providers participating in the Commonwealth's Medicaid program for incurred costs and the receipt and use of federal funds on a quarterly basis as federal financial participation in expenses incurred as medical assistance under the state's approved plan. See Mass. Gen. Laws Ann. ch. 118E, § 3 (West Supp. 1979); 42 U.S.C. § 1396b (1976). Among other things, expenditures of state funds and the reciept of federal financial participation in such expenditures are distinct events often widely separated in time. In addition, the broad injunctions issued by the courts below pay no attention to the question of whether the Congress or the Secretary of HEW would have desired such a severe sanction to be imposed. See 42 U.S.C. § 1396c (1976) (in case of plan or administrative non-conformity, Secretary has discretion either to withhold further payments or limit payments to categories under or parts of state plan not affected by non-conformity).

CONCLUSION

For the reasons set forth above, the Court should note probable jurisdiction of the state officials' appeal and set the case for argument.

Respectfully submitted,

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December 24, 1979

79-1027

Supreme Court, U. S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

EDWARD J. KING,
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL

Appellants

v.

PRETERM, INC.,

Appellees

On Appeal from the United States Court of
Appeal for the First Circuit

APPENDIX TO JURISDICTIONAL STATEMENT

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IN THE
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APPENDIX TO JURISDICTIONAL STATEMENT

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DON R. JAFFEE, M.D., ET AL.,
Plaintiffs

v. CIVIL ACTION
No. 78-1637-C

ALEXANDER E. SHARP, II,
Defendant

PRETERM, INC., ET AL.,
Plaintiffs

v. CIVIL ACTION
No. 78-1653-C

MICHAEL S. DUKAKIS, ET AL.,
Defendants

ORDER

July 28, 1978

CAFFREY, Ch. J.

In accordance with the Opinion filed this day, it is ORDERED, ADJUDGED AND DECREED as follows:

1. Chapter 367, §2, Item 4402-5000 of the Massachusetts Acts of 1978 is enjoined from implementation to the extent that it limits the scope of Medicaid-reimbursed abortions authorized by Section 209 of Public Law 95-205, 91 Stat. 1460, commonly known as the Hyde Amendment;

2. For reasons stated in the Opinion, Civil Action No. 78-1637-C is dismissed as to all plaintiffs except Don R. Jaffee, M.D., and Susan Doe, III, and the members of classes they purport to represent;

3. A hearing on class certification in this matter will be held August 28, 1978, at 2:00 P.M.

/s/
Andrew A. Caffrey, Ch. J.

UNITED STATES COURT OF APPFALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants,
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants, Appellees.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellees,
v.
ALEXANDER E. SHARP, II., ET AL.,
Defendants, Appellants.

Before Campbell, J., and
Bownes, J., Circuit Judges.

ORDER OF COURT

Entered: August 7, 1978

Bownes, Circuit Judge. Appellants Preterm, Inc., et al., seek an expanded injunction pending appeal of the District Court's preliminary injunction. The motion is granted and an expedited hearing is set for the September Term.

Focusing on the request for an expanded injunction pending appeal, we conclude that the equities of the situation, often described in terms of irreparable harm, favor relief during this brief interim period. We take judicial notice of the fact that until August 1, 1978, the Commonwealth of Massachusetts provided abortions for a class even larger than that described by the phrase "medically necessary". The restrictions on funding required by the new Massachusetts Law went into effect on August 1, 1978. Where such temporary protection is supported, an appellate court should not delve very deeply into the underlying merits of the case. At this time we are only interested in preserving the status quo. The able oral argument and brief of both parties persuade us that appellants' position, in light of our brief exposure to the issue, is not patently insubstantial. While we may well decide in the defendants' favor after further argument and briefing, we are not now convinced that it is obvious that Congress manifested a clear desire to amend or modify its prior intent to require states to provide "medically necessary" abortions to qualified persons as a requirement for a state's participation in the Medicaid program. The District Court framed its preliminary injunction order to reflect "what the state legislature

would have intended had that body realized that ch. 367 conflicted with the objectives of Title XIX and was for that reason unenforceable as passed," and both parties, at oral argument, requested that such a guideline be incorporated in our decision. This we do.

An expedited appeal from the preliminary injunction and the dismissal of certain putative plaintiffs will be held at the September sitting. Pending our decison of that appeal the injunction issued by the District Court is modified to require the defendants-appellees to provide funding for abortions to "All Medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically-necessary service".

The Court directs the parties, in their briefs, to address inter alia: (1) In Preterm v. Dukakis, both parties should provide the Court with the fullest possible discussion of the Congressional debate leading up to the passage of section 209 of Pub. L. 95-205; 91 Stat. 1460, the so-called "Hyde Amendment". In this regard, the parties might consider submitting a stipulated index, indicating every page in the Congressional record in which the Hyde Amendment was discussed. (2) In Parent's Aid Society v. Sharp, the Court has grave doubts as to whether it has

appellate jurisdiction now to consider the dismissal of certain named plaintifffs. If the parties wish, they may submit briefs on this jurisdictional question.

All briefs for all parties shall be filed by August 25, 1978. The Court sees no necessity for reply briefs.

In accordance with this order, the motion for an expanded injunction pending appeal and for an expedited hearing are hereby granted. The appeals will be heard on Wednesday, September 6, 1978.

By the Court:

DANA H. GALLUP, Clerk.

By: /s/ Francis P. Scigliano
Chief Deputy Clerk.

[Cert. cc: Clerk, U.S.D.C., Mass., cc: Messrs. Reinstein, Rosenfeld, Schmidt, and Ms. Gertner]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DON R. JAFFEE, M.D., ET AL.,
Plaintiffs
v.
ALEXANDER E. SHARP, II,
Defendant

CIVIL ACTION
No. 78-1637-C

PRETERM, INC., ET AL.,
Plaintiffs
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants

CIVIL ACTION
No. 78-1653-C

FINAL JUDGMENT

September 6, 1978

CAFFREY, Ch. J.

This matter came before the Court on defendants' motion to consolidate preliminary injunction with the merits and for the entry of a final order.

Defendants' motion is assented to by counsel for all plaintiffs in both cases. Accordingly, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The hearing held on the motion for preliminary injunction on July 19, 1978 is considered consolidated as a hearing on the merits as well; and

2. The preliminary injunction entered July 28, 1978 is entered effective today as a final judgment in both actions.

Andrew A. Caffrey, Ch. J.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants.,
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants, Appellees.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellees.
v.
ALEXANDER E. SHARP II, ET AL.,
Defendant, Appellants.

No. 78-1326.

PARENTS' AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellants.,
v.
ALEXANDER E. SHARP, II.,
Defendant, Appellee.

ORDER OF COURT

Entered September 14, 1978

Upon joint motion,

It is ordered that the respective appeals filed by the parties in district court case number 78-1637 and 78-1653 from the final judgment entered on September 6, 1978 be, and hereby are consolidated with the parties respective appeals docketed in this court as case numbers 78-1324; 78-1325, and 78-1326.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Ms. Gertner and Messrs. Reinstein, Rosenfeld and Ms. Schmidt.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants.,
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants, Appellees.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellees.
v.
ALEXANDER E. SHARP II, ET AL.,
Defendants, Appellants,

No. 78-1326.

PARENTS' AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellants.,
v.
ALEXANDER E. SHARP, II.,
Defendant, Appellee.

[D.C. Mass. Nos. 78-1637 & 1653]

JUDGMENT

Entered January 15, 1979

These causes came on to be heard on appeals from the United State District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: That part of the

judgment of the district court enjoining implementation of Stat. 1978, Ch 367, Sec 2, Item 4402-5000, in so far as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment, is affirmed;

That part of the judgment of the district court that dismissed the plaintiffs from District Court Case No. 78-1637-C is vacated and the causes are remanded to the district court for further proceedings in accordance with the opinion of the court filed this day.

No costs.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[cc: Ms. Gertner and Messrs. Rosenfeld, Balliro and Hurley.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants.,
v.
MICHAEL S. DUKAKIS, ET AL.,
Defendants, Appellees.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellees.
v.
ALEXANDER E. SHARP II, ET AL.,
Defendants, Appellants.

No. 78-1326.

PARENTS' AID SOCIETY, INC., ET AL.,
Plaintiffs, Appellants.,
v.
ALEXANDER E. SHARP, II,
Defendant, Appellee.

ORDER OF COURT

Entered February 2, 1979

Upon consideration of the petition for rehearing,

It is ordered that said petition filed on January 29, 1979 be, and the same hereby is, denied.

By the Court:

DANA H. GALLUP, Clerk.

By /s/ Francis P. Scigliano
Chief Deputy Clerk.

[cc: Ms. Gertner, and Messrs. Rosenfeld, Balliro and Hurley.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., et al.,
Plaintiffs, Appellants,

v.

EDWARD J. KING, et al.,
Defendants, Appellees.

MEMORANDUM AND ORDER

Entered June 21, 1979

Before COFFIN, Chief Judge,
CAMPBELL and BOWNES, Circuit Judges.

Plaintiff-appellants have filed a motion to have this court entered an order modifying its injunction of August 7, 1978, continued in effect by its order of January 29, 1979, so as to enjoin enforcement of Mass. St. 1979, ch. 268 § 1, signed into law on June 12, 1979. Specifically appellants seek to enjoin enforcement of chapter 268, §1, by the state defendants "insofar as it prohibits the expenditure of state funds to pay for

abortions for medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically necessary service." Defendant-appellees oppose the motion as untimely, arguing that chapter 268, § 1 is not yet in effect and will not be in effect until ninety days pass from the date on which it was signed into law, absent an emergency declaration to expedite its implementation. See Opinion of the Justices, 368 Mass. 889, 336 N.E.2d 728 (1975). They further note that the statute may not take effect if an effective referendum petition is filed seeking its repeal and, once again, the Governor does not add an emergency declaration to the legislation.

While appellees' position technically is correct, we are unpersuaded that appellants' motion therefore must be dismissed. In all likelihood, chapter 268, § 1, will go into effect 90 days from June 12, 1979, and the Court can see no reason to invite the delay and uncertainty that will result if appellants are forced to renew their motion after the effective date of the law. Accordingly, this court retains jurisdiction over appellants' motion but reserves judgment pending consideration of the following: by July 11, 1979, the state defendants are ordered to show cause why this court's order of August 7, 1978, or its mandate in

Preterm v. Dukakis, 591 F.2d 121 (1st Cir. 1979), whichever should be in effect when chapter 268, §1 becomes effective, does not render chapter 268, § 1 unenforceable, and why enforcement of chapter 268, § 1 will not place the state defendants in contempt of court. They may, if they see fit, submit affidavits in support of their brief on these questions. Appellants' response will be due July 25, 1979.

By the Court,

/s/ DANA H. GALLUP
Clerk

[cc: Ms. Gertener and Messrs. Reinstein, Rosenfeld, Hurley and Balliro.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324.

PRETERM, INC., ET AL.,
Plaintiffs, Appellants,

v.

MICHAEL S. DUKAKIS ET AL.,
Defendants, Appellees.

Before COFFIN, Chief Judge,
CAMPBELL and BOWNES, Circuit Judges.

MEMORANDUM AND ORDER

Entered August 2, 1979

Plaintiffs-appellants Preterm, Inc., et al., have filed a motion for clarification of the court's order of August 7, 1978. In Preterm, Inc. v. Dukakis, 591 F.2d 121, 134 (1st Cir. 1979), this court held as follows: "The judgment of the district court therefore is affirmed, enjoining implementation of Stat. 1978, ch. 367, § 2, Item 4402-5000, insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment.

The state defendants have admitted in a memorandum filed with this court that the state budget presently in effect, Stat. 1979, ch. 393, Item 4402-5000 contains a restriction on state reimbursement for abortions which is in fact more restrictive than the prior enactment enjoined by this court. Because the state defendants have conceded that Item 4402-5000 is unenforceable, so long as the Commonwealth continues to participate in Title XIX, insofar as it conflicts with our mandate in Preterm, Inc. v. Dukakis, supra, we see no reason not to add to our mandate in that case as follows: We hereby enjoin implementation of Stat. 1979, ch. 393, Item 4402-5000 insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment.

In addition, the court amends its order of August 7, 1978, presently in effect pending disposition of the Supreme Court of appellants' petition for certiorari in Preterm, Inc. v. Dukakis, supra, to further enjoin enforcemnt of ch. 393, Item 4402-5000 insofar as it prohibits the expenditure of state funds for abortions for Medicaid-eigible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortions is medically necessary service.

The court declines at the present time to include chapter 268, § 1, which is not scheduled to go into effect until September 12, 1979, within this order.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[Cert. c. Clerk, U.S.D.C., Mass.; cc: Ms. Gertner and Messrs. Reinstein, Rosenfeld, Hurley and Balliro.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1324
78-1325
78-1326

PRETERM, INC. ET AL.,
Plaintiffs, Appellants,

v.

EDWARD J. KING, ET AL.
Defendants, Appellees

DEFENDANTS' NOTICE OF APPEAL

Edward J. King, et al., defendants, appellees, give notice that they appeal from this Court's orders of August 7, 1978, January 15, 1979 (judgment), and August 2, 1979 to the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(2) (1976).

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

_____
Garrick F. Cole

_____
Paul W. Johnson

Assistant Attorneys General
Department of the Attorney General
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Dated: August 20, 1979

Supreme Court, U. S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

79-1027

United States Court of Appeals

For the First Circuit

No. 78-1324

PRETERM, INC., et al.,

PLAINTIFFS, APPELLANTS,

v.

MICHAEL S. DUKAKIS, et al.,

DEFENDANTS, APPELLEES.

No. 78-1325

PARENT'S AID SOCIETY, INC., et al.,

PLAINTIFFS, APPELLANTS,

v.

ALEXANDER E. SHARP II,

DEFENDANT, APPELLANT.

No. 78-1326

PARENT'S AID SOCIETY, INC., et al.,

PLAINTIFFS, APPELLANTS,

v.

ALEXANDER E. SHARP II,

DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,

CAMPBELL and BOWNES, *Circuit Judges*.

Nancy Gertner, with whom *Silverglate, Shapiro & Gertner*, *Barbara Sard*, and *John Reinstein*, were on brief, for Preterm, Inc., et al.

S. Stephen Rosenfeld, Assistant Attorney General, with whom *Francis X. Bellotti,* Attorney General, and *Garrick F. Cole,* Assistant Attorney General, were on brief, for Sharp, et al.

Joseph J. Balliro, with whom *Joan C. Schmidt,* was on brief, for Parent's Aid Society, Inc., et al.

Joseph J. Hurley and *Nutter, McClennen & Fish* on brief for William A. Lynch, M.D., et al., amici curiae.

January 15, 1979

COFFIN, *Chief Judge.* In this case we are called upon to assess the validity, in terms of compliance with the federal Medicaid Act, of Chapter 367, § 2, Item 4402-5000 of the Massachusetts Acts of 1978. Chapter 367 is an appropriations provision, limiting the expenditure of state funds for abortions to those abortions "which are necessary to prevent the death of the mother" and to those procedures "necessary for the proper treatment of the victims of forced rape or incest" if the incident is properly reported within thirty days.

At issue, as well, is the impact on the Medicaid Act and state plans thereunder of the Hyde Amendment, Section 209 of Pub. L. 95-205; 91 Stat. 1460 (Dec. 9, 1977), first enacted as a rider to the FY 1977 Health, Education and Welfare appropriations bill. The Hyde Amendment for FY 1978 prohibits federal funding for abortions except "when the life of the mother would be endangered", when the woman is a "victim of rape or incest" and reports the incident "promptly" and in instances where "severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."[1]

[1] A number of lower courts have considered the compliance of state plans, similar to that of Massachusetts, with the Medicaid Act and have reached differing results. *See, e.g., Emma G.* v. *Edwards,* Civ. No. 77-1342 (E.D. La. Nov. 27, 1978) (court issued preliminary injunction enjoining enforcement of statute which barred use of state funds for abortions "except when the abortion is medically necessary to prevent the death of the mother"); *Roe* v. *Casey,* Civ. Action No. 78-2214 (E.D. Pa. June 30, 1978) (district court issued temporary restraining order preventing state from refusing to reimburse providers for medically necessary abortions); *D. R.* v. *Mitchell,* Civ. No. 77-1056 (D. Utah June 20, 1978) (court granted state's motion for summary judgment and held that Medicaid Act does not require funding of all medically necessary abortions, but only those when the mother's life was endangered, relying in part on the Hyde Amendment's language); *Zbaraz* v. *Quern,* Civ. No. 77C 4522 (N.D. Ill. May 15, 1978) (on remand from the Seventh Circuit, 572 F.2d 582 (7th Cir. 1978) (district court enjoined state from denying reimbursement for therapeutic abortions and found that Hyde Amendment had no impact on the state's obligations); *Smith* v. *Ginsberg,* Civ. No. 75-0380 CH (S.D. W.Va. May 9, 1978) (district court enjoined enforcement of statute to extent it denied reimbursement for necessary therapeutic abortions, ordered parties to brief the Hyde Amendment issue).

In *Doe* v. *Kenley,* No. 78-1330 (4th Cir. Oct. 19, 1978), the Fourth Circuit considered the "limited" issue of whether a state which has established a policy for the stated objective of eliminating state medical assistance for *nontherapeutic abortions* may implement that policy by requiring a physician to certify that the woman's life would be endangered if the pregnancy was carried to term. It rejected the state's argument, adopted by the district court, that the words "endangerment of life" really meant "endangerment of health" and remanded the case directing that an order be entered clarifying the state's standard for funding abortions. The court further stated "that on the facts of this case we need not reach the statutory and constitutional issues raised by Doe of whether a state may be compelled by either Title XIX or the Constitution to fund induced therapeutic abortions." *Id.* slip op. at 12.

Thus, we believe that this court is the first court of appeals to reach the issues presented by this case.

The district court found that Chapter 367 violated specific provisions and the basic thrust of the Medicaid Act by failing to provide for abortions that were "medically necessary". However, because the court considered it "anomalous" to impose upon the state the obligation to fund "medically necessary" abortions for which the Hyde Amendment had prohibited federal funding, its preliminary injunction modified Chapter 367 to require state payment for at least those abortions funded under the Hyde Amendment. The court did not reach the constitutional arguments of the parties. *See Hagans* v. *Levine,* 415 U.S. 528 (1974).

Preterm, Inc., et al., plaintiffs below, then sought an expanded injunction pending appeal of the district court's preliminary injunction.[2] We granted that relief, and modified the district court's injunction to require the Commonwealth of Massachusetts to provide funding for abortions to "all Medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically-necessary service". Subsequently the district court ordered consolidation of the preliminary injunction with the merits and entered its preliminary injunction as a final order. All parties have appealed, and it is the district court's final order that is before us on review. We turn first to the question whether Chapter 367 violates the requirements of the Medicaid Act by providing for abortions, in circumstances other than pregnancy resulting from forced rape or incest, only when the abortion is "necessary to prevent the death of the mother".

---

[2] The named plaintiffs in No. 78-1324 are Preterm, Inc., a non-profit corporation providing clinical services, including abortions, for indigent women; board-certified obstretricians and gynecologists practicing in Massachusetts; a Medicaid-eligible pregnant woman residing in Massachusetts; Massachusetts Welfare Recipients for Welfare Reform, an association of public assistance recipients; and Planned Parenthood League of Massachusetts, an unincorporated agency providing abortion counseling. In Nos. 78-1325 and 78-1326, the named plaintiffs, some of whom were dismissed below for lack of standing, *see infra,* are several Medicaid-eligible pregnant women; a Massachusetts physician and Medicaid provider; and an abortion counselor and director of Parents Aid Society, Inc., a non-profit Massachusetts corporation providing abortion counseling, which is also a plaintiff. The defendants in these cases are various officials of the Commonwealth of Massachusetts.

The district court also certified, pursuant to Fed. R. Civ. P. 23(c)(1), two classes of plaintiffs in the Preterm action: the first consisting of "all Medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically-necessary service but for whom an abortion is not necessary to prevent death", and second, "all physicians and other Medicaid providers . . . willing to perform abortions for women who fall within the first class."

I. *The Requirements of the Medicaid Act*

The Medicaid Act, Title XIX of the Social Security Act of 1965, operates to enable participating states, through the use of federal funds, to provide medical services to welfare recipients (the "categorically needy") and if the state chooses, to other needy recipients (the "medically needy"). *See Beal* v. *Doe,* 432 U.S. 438, 440 n. 1 (1977); 42 U.S.C. § 1396a(a)(10)(A), (C). Although a state's participation in Medicaid is voluntary, if it chooses to adopt a plan it must do so consonant with the requirements imposed by the Medicaid Act. *See Beal* v. *Doe, supra,* 432 U.S. at 441; *White* v. *Beal,* 555 F.2d 1146, 1149 (3d Cir. 1977); *Rush* v. *Parham,* 440 F. Supp. 383, 385 (N.D. Ga. 1977).

The plaintiffs below argue, and the district court found, that abortions, when "medically necessary" as determined by a physician are within the category of services which a state must provide. The state, on the other hand, contends that participating states are afforded great latitude in deciding which services will be furnished under their plans, and maintains that the Act nowhere requires a state to provide all "medically necessary" services. The disagreement between the parties is thus a fundamental one, and one which our study of the statute has not easily resolved.

Our analysis begins with the opening section of the Act, which both authorizes an appropriation and sets forth a general statement of purpose:

> "*42 U.S.C. § 1396. Appropriation*
>
> For the purpose of enabling each State, *as far as practicable* under the conditions of such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled *individuals, whose income and resources are insufficient to meet the costs of necessary medical services,* and (2) rehabilitation . . . , there is hereby authorized to be appropriated . . . ." (emphasis added).

The district court and other courts which have found a requirement within the Medicaid Act that states provide all "medically necessary" services have relied heavily on this section. *See, e.g., Rush* v. *Parham, supra,* 440 F. Supp. at 389. It does not seem, however, that the words "necessary medical services" are properly read as a substantive requirement imposed on the states. Instead, this section merely specifies for whose benefit federal funds are to be appropriated—those "individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396. *See also* 42 U.S.C. § 1396a (a)(10)(C). Furthermore, the section apparently contemplates some flexibility in the Act's demands on each state, stating that its purpose is to enable a state to furnish medical assistance "as far as practicable under the conditions of such State."

Our view finds support from the structural composition of the Act. Section 1396a is the provision which details the required contents of a state plan for medical assistance. Among the 37 items listed, we find no mandate that all "medically necessary" services be provided. We therefore hesitate to draw the words "necessary medical services" from their context—an appropriations section—and in effect transport them into a contents section requirement.

Although we are unable to discover a statutory requirement that states provide medically necessary services, we do find guidance within the statute, albeit less explicit, for deciding this case. Section 1396a requires that a state plan for medical assistance provide five general categories of medical services to the categorically needy, enumerated in § 1396d(a): (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facilities, screening and treatment for persons under the age of 21 and family planning services

and supplies, and (5) physicians' services.[3] In *Beal* v. *Doe, supra,* 432 U.S. 438, the Supreme Court, deciding whether a state plan which denied funds for abortions unless they were certified by a physician as "medically necessary" was violative of the Medicaid Act, stated that: "Title XIX [Medicaid] does not require states to provide funding for all medical treatment falling within the five general categories". But, "it does require that state Medicaid plans establish 'reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX].' 42 U.S.C. § 1396a(a)(17) (1970 ed., Supp. V)." *Id.* at 440-41. The Court further emphasized that the Act "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives of the Act.' ", *id.* at 444, and concluded that the state's "refusal to extend Medicaid coverage to nontherapeutic abortions is not inconsistent with Title XIX." *Id.* at 447.

The Court's opinion contains a dictum relied on by the district court: "*[a]lthough serious statutory questions might be presented if a Medicaid plan excluded necessary medical treatment from its coverage,* it is hardly inconsistent with the objectives of the Act for a State to refuse to fund *unnecessary*—though perhaps desirable—medical services." *Id.* at 444-45 (emphasis added to introductory clause). This language is indeed relevant to the issue at hand—the validity of a state plan which allows payment for abortion services in other than cases of rape or incest only when "necessary to prevent the death of the mother"; but we do not believe that we should read this dictum as signalling a flat rule that all services within the five general

[3] States are given a greater choice in determining the types of services that it provides to the "medically needy". 42 U.S.C. § 1396a(a)(13)(C).

categories deemed "medically necessary" by a patient's physician must be provided by the state plan.

Such a reading, permitting the most varied content to the words "necessary medical services", the variations being theoretically limited only by the diversity of physicians, would seem at war with the goals of consistency and fairness in the administration of the statute. We see two levels of judgment as to medical necessity in the statutory scheme. The first is the macro-decision by the legislature that only certain kinds of medical assistance are deemed sufficiently necessary to come under the coverage of its plan. The second is the micro-decision of the physician, that the condition of his patient warrants the administering of a type of medical assistance which that plan makes available. Our task here is to test the judgment of the Massachusetts legislature as to medical necessity, i.e., was its decision to limit state funded abortions, in other than cases of rape or incest, to those necessary to save the life of the woman "reasonable" and "consistent with the objectives of [Title XIX]"? 432 U.S. at 441, 444; *see* 42 U.S.C. § 1396a(a)(17).

The regulations promulgated by the Department of Health, Education and Welfare pursuant to the Medicaid Act and having the force of law, detail the permissible and impermissible ways in which a state may exclude or diminish payment for certain services in its plan. 42 C.F.R. § 440.230 (1978) provides that:

> "(a) The plan must specify the amount and duration of each service that it provides.
>
> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
>
> (c) (1) The medicaid agency may not deny or reduce the amount, duration, or scope of a required service under §§ 440.210 [for the categorically needy] and 440.220 [for the medically needy] to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
>
> (2) The agency may place appropriate limits on a service based on medical necessity or on utilization control procedures.

The plaintiffs below maintain that the limitations imposed by Massachusetts on abortion services render those services insufficient in "amount, duration and scope" to reasonably achieve their purpose, and that the limitations are based solely on the type of medical condition involved rather than on determinations of medical necessity.

In *White* v. *Beal*, 555 F.2d 1146 (3d Cir. 1977), the Third Circuit construed this regulation in determining whether a state plan, which made eyeglasses available to persons who needed them because of eye pathology but denied them to persons suffering from other types of visual impairment, violated the Medicaid Act. The court held that the plan was violative of the Act because it distributed the service in a manner which did not bear a rational relationship to the "underlying federal purpose of providing the services to those in greatest need of it", *id.* at 1151. Citing 45 C.F.R. § 249.10(a)(5)(i), the earlier codification of the regulation, it stated that "[t]he regulations permit discrimination in benefits based upon the degree of medical necessity but not upon the medical disorder from which the person suffers." *Id.* at 1151-52.

We think that the limitations imposed by Chapter 367 on abortion services similarly violate the purposes of the Act and discriminate in a proscribed fashion, although perhaps less obviously than did the plan in *White* v. *Beal*, *supra*. It could perhaps be argued that the Massachusetts plan reserves abortion services to those in greatest need —women who will die without an abortion—and denies it to those who need it less—women who will suffer damage to their health, no matter how grievous, but who will sur-

vive without the abortion. But we do not believe that the Medicaid Act contemplates or sanctions anything so stark. When a state singles out one particular medical condition —here, a medically complicated pregnancy—and restricts treatment for that condition to life and death situations it has, we believe, crossed the line between permissible discrimination based on degree of need and entered into forbidden discrimination based on medical condition.

The Medicaid system was established for the purpose of enabling a state, with federal participation, to provide medical assistance to eligible individuals in need of treatment and unable to pay for it. *See* 42 U.S.C. § 1396. We find it "unreasonable" and wholly "[in]consistent with the objectives of the Act", 42 U.S.C. § 1396a(a)(17), for a state to provide abortion services and then, with limited exceptions for victims of rape and incest, deny it to all those who will not die without it. We know of no other instance where a legislative decision to pay for medical care is based on the distinction between life and death. If only those suffering at death's door from sickle cell anemia or syphilis could receive publicly provided medical care, but not those condemned to a lifetime of dependency, one would be hard put to discern any rational social objective being thereby served. So we think here.[4] In addition, Chapter 367 is inconsistent with the Act, which provides for a central role for the physician in determining proper treatment, by circumscribing his professional judgment so drastically. As a physician's affidavit submitted on behalf of the plaintiffs below attests "[a] standard of medical necessity which considers only the certainty or likelihood

[4] The limitations in the Massachusetts Act clearly cannot be justified as a cost-saving mechanism. *See White* v. *Beal*, 555 F.2d 1146, 1150 (3d Cir. 1977). It is uncontroverted that the costs of medical treatment necessary when even healthy pregnancies are carried to full term exceed the costs of therapeutic—or even elective—abortions. *See Maher* v. *Roe*, 432 U.S. 464, 478-79 (1977).

of a patient's death is alien and antithetical to medicine in general. I know of no area of medical practice in which a physician exercises professional responsibility solely in terms of life and death assessments."

Accordingly, we conclude that Chapter 367 fails to provide abortion services consistent with the requirements of the Medicaid Act. We now turn to the question of the impact of the Hyde Amendment on state plans adopted pursuant to that Act.

II. *The Impact of the Hyde Amendment*

The Hyde Amendment, the name given to language inserted into the FY 1977 and 1978 Health, Education and Welfare appropriations bills, in its current form prohibits use of appropriated federal funds for Medicaid abortions except in specified situations.[5] The first two are similar to those in Chapter 367—instances where "the life of the mother would be endangered" and when she is the victim of rape or incest and reports the incident promptly. The Hyde Amendment differs from the Massachusetts Act, however, by providing a third exception—"where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."[6]

[5] Congress, in the final days of the Second Session of the 95th Congress, reenacted the identical language in its FY 1979 HEW appropriations bill.

[6] Several district courts have commented on the impact of earlier versions of the Hyde Amendment on the Medicaid Act. In *McRae* v. *Mathews*, 421 F. Supp. 533, 538 (E.D. N.Y. 1976), the court found that:

> "The manifest fact is that [the Hyde Amendment] is calculated to stop the provision of abortional services from public funds; it is not calculated to shift the burden of providing this medical assistance to the states."

Finding probable success on the merits in light of cases which found plans eliminating elective abortions invalid, the court enjoined the Secretary of Health, Education and Welfare from deny-

Plaintiffs contend that the Hyde Amendment must be construed according to its literal terms as authorizing federal funds for certain limited categories of abortions and thus shifting the total cost to the states of providing those abortion services not funded by the Hyde Amendment but nonetheless required by the Medicaid Act. They maintain that the Hyde Amendment has no impact on a state's obligations to provide services required by the Act.

The state, on the other hand, argues that even if this court should find, as it has, that Chapter 367 contravenes the Medicaid Act by providing abortions in cases other than rape or incest only when necessary to prevent the woman's death, the Hyde Amendment constitutes a congressional statement that the states need not fund more abortions than Congress is willing to fund, although they could choose to do so if they wished. The Hyde Amendment, according to the state, is to be viewed as a policy decision concerning a state's obligations to provide publicly funded abortions and not as merely a shifting of the costs of non-Hyde Amendment abortions to the states. In support of its position, the state points to the congressional debates which preceded passage of the Amendment as well as the basic structure of the Act, namely joint federal and state participation in providing medical assistance to the needy. Apparently relying on this latter factor, the district court found that it would be "anomalous" to require states to pay for abortions for which the Hyde Amendment had withdrawn federal funds and enjoined the state from refusing to provide abortions for which Hyde Amendment funds were available. By so ruling, the court implicitly concluded that the Hyde Amendment should be read as having a substantive effect on the state's obligations under the Medicaid Act and not merely as a shifting of the responsibility to pay for abortions.

Our inquiry begins with the words of the statute itself, which if clear, ordinarily obviate the need to resort to extrinsic aids of statutory construction. *See Tennessee Valley Authority* v. *Hill*, 98 S.Ct. 2279, 2296 n. 29 (1978); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917); *Massachusetts Financial Services, Inc.* v. *Securities Investor Protection*, 545 F.2d 754, 756 (1st Cir. 1976). The language of the Hyde Amendment, on its face, supports the plaintiffs' position. The Amendment states that "none of the funds provided for in this paragraph shall be used" to perform abortions, unless they fall within specified categories, and thus reads as a mere withdrawal of federal funds for certain services. No mention is made in the provision of any impact on the state's obligations. However, when the plain meaning of a statute produces a result "plainly at variance with the policy of the legislation as a whole" and "aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on

ing Medicaid reimbursement for elective abortions. The case was vacated and remanded on appeal for further consideration in light of *Maher* v. *Roe*, 432 U.S. 464 (1977) and *Beal* v. *Doe*, 432 U.S. 438 (1977). *See Califano* v. *McRae*, 433 U.S. 916 (1977); 434 U.S. 1301 (1977).

In contrast, in *Doe* v. *Mathews*, 420 F. Supp. 865, 869 (D. N.J. 1976), the court refused to issue a temporary restraining order preventing the Secretary from enforcing the Hyde Amendment, in part, because:

> "[Title XIX] was not amended or affected by the Hyde Amendment. Title XIX remains in force as it stood when *Beal* and *Klein* was decided. The Hyde Amendment affects the federal appropriation to HEW for fiscal 1977, and its application is limited to the treatment of items of cost incurred by a Medicaid State for which federal funds can be paid to that State. It has no application to the kinds of items for which a State must pay if it has enacted a Medicaid Law."

See Doe v. *Mathews*, 422 F. Supp. 141 (D. D.C. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (court found that plaintiffs had no standing to sue the Secretary in a Hyde Amendment challenge, not having demonstrated that state officials would, or could pursuant to Title XIX or the Constitution, deny reimbursement for abortions other than those provided for in the Hyde Amendment).

'superficial examination.' " *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-44 (1939); *Massachusetts Financial Services, Inc.* v. *Securities Investor Protection, supra,* 545 F.2d at 756. The construction urged by the plaintiffs would result in imposing an obligation on the states to fund the total cost of non-Hyde Amendment therapeutic abortions, a result not consonant with the basic policy of the Medicaid system under which the federal government participates in the funding of medical services provided by the states. *See* 42 U.S.C. § 1396; *Doe* v. *Beal, supra,* 432 U.S. at 440; *White* v. *Beal, supra,* 555 F.2d at 1149. We therefore think it necessary to consider the legislative history of the Hyde Amendment.

The Legislative History

Congressional consideration of the Hyde Amendment began in the House of Representatives on June 17, 1977 and ended with a Senate debate and vote on a compromise measure on December 7, 1977. During this six month period some ten different versions were passed in one of the chambers, *see* CCH Medicare-Medicaid Reporter ¶ 28,832, at 9151, and no fewer than 25 roll call votes had been taken in the House and Senate. Congressional Quarterly, Weekly Report, Vol. XXXVI No. 5 at 258 (Feb. 4, 1978). There are neither conference reports nor committee reports; all we have are the debates and insertions in the Congressional Record. These, however, if considered as a whole, are illuminating. The leaders of both sides in the debate spoke often and long enough and clearly enough so that there is no doubt about what the Congress wanted to do and thought it was doing.

To begin with, there are a few observations to the effect that all that the Amendment is concerned with is the expenditure of federal dollars. For example, on the first day of debate in the House, Congressman Doran said, "It

simply denies Federal funds for the realization of a personal . . . decision . . . ." 123 Cong. Rec. H. 6086 (June 17, 1977). Similarly, Congressman Edwards observed that "the only thing over which we have any control is what we do with Federal dollars." *Id.* at 6090. Much later, Congressmen Hyde and Flood made statements to the effect that the issue at hand concerned the use of federal funds for abortion. 123 Cong. Rec. H. 10826-30 (Oct. 12, 1977). *See* 123 Cong. Rec. S. 11039 (June 29, 1977) (Senators Bellmon and Stennis). Not only are these the only such comments in the entire debate which the briefs of the parties and our own research have unearthed, but even they are consistent with the conclusion that the Congress utilized the device of withholding federal funds as the means of making a substantive change in the law.

Moreover, the record is clear that both houses of Congress were acutely conscious that they were engaging in substantive legislation. The very first event which took place in the House of Representatives was the making of two points of order, the sustaining of the same, and an amendment by sponsor Hyde simply confining his Amendment to a ban on spending federal funds for abortions, any abortions. Congressman Hyde then expressed his regret that the points of order forced him to exclude mother's-life-saving therapeutic abortions from his Amendment, adding that he agreed with those who had said it was unfortunate to burden appropriation bills with complex issues such as busing and abortion but that "The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the Members may work their will, unfortunately, is an appropriation bill." 123 Cong. Rec. H. 6083 (June 17, 1977). Subsequently, on August 2, after a candid explanation by

Congressman Flood that the only way to enable the Amendment to exclude from its proscriptions abortions in cases of life endangering pregnancies was to restore the original language, such language was restored and no further points of order were made. 123 Cong. Rec. H. 8348-49 (Aug. 2, 1977).

In the Senate a point of order was made and the Senate, by voting that a Senate version of the Amendment was germane to the subject matter of the House bill, thus satisfying Senate Rule XVI, legitimized its subsequent legislating. 123 Cong. Rec. S. 11055 (June 29, 1977). Before the vote was taken, Senator Brooke lodged this protest:

> "Mr. President, I urge the Senate to support the amendment striking all restrictions on the use of medicaid funds for the performance of abortions. Such restrictions are a blatant case of legislating on an appropriations bill, a most unwise practice and one which I adamantly oppose regardless of the subject." *Id.* at S. 11035.[7]

At the very end of the process Senator Magnuson, a proponent of fewer restrictions, expressed his unhappiness, saying pithily, "I have said many, many times, as sort of a voice in the wilderness, that this does not belong on the HEW bill. It is legislation of the rawest nature on an appropriations—money—bill." 123 Cong. Rec. S. 19440

[7] Senator Brooke continued, voicing other objections to the proposed Amendment:

> "However, I oppose restrictions on medicaid abortions for other equally valid reasons. First, the Senate should not through a funding decision in effect deprive our most vulnerable and helpless citizens, the poor, of an established constitutional right. Second, the Senate should not so thoughtlessly try to impose simplistic solutions on so complex an issue. And third, the Senate should not legislate in a medical area in which we have absolutely no competence and dictate medical decisions which a physician and a physician alone is trained and capable to make." 123 Cong. Rec. S. 11035 (June 29, 1977).

Dec. 7, 1977). And Senator Stennis, a supporter of greater restrictions on abortions, complained about the Senate's "obscure rules about amendments on appropriations bills, that contain legislation on appropriations bills", and noted that a "lot of this type of proposals [*sic*] are in this bill, including the point on abortion." *Id.* at S. 19445. Senator Brooke devoted much of his effort in this part of the debate to making clear "the legislative intent of the provisions we are acting upon . . . . Since [HEW has] not given us any interpretation, I think we should clarify for them what the legislative intent is." *Id.* at S. 19441. Senator Javits called the end result of this six month effort "a milestone in our legislation". *Id.* at S. 19443.

Moreover, the inclusion of very specific and detailed provisions underscored the substantive nature of the legislation being enacted. *See, e.g.,* the comments of Congressman Michel in explaining how the House of Representatives had rejected the inclusion of danger to mental health as a reason for funding abortions, 123 Cong. Rec. H. 12651, 12656 (Dec. 6, 1977); Senator Brooke's and Senator Javits' doubts of the constitutionality of the requirement of a certificate from two physicians that severe and long-lasting physical health damage would occur, 123 Cong. Rec. S. 19440-19443 (Dec. 7, 1977); and Congressman Michel's attempts to define what was meant by the prompt reporting requirement in cases of rape and incest, 123 Cong. Rec. H. 12652-12653 (Dec. 6, 1977).

Perhaps the message of the legislation was conveyed most clearly by those who were opposed to restrictions on publicly funded abortions. Their litany of opposition stressed the harshness of depriving the poor of abortions which the more affluent could afford. The universal assumption in debate was that if the Amendment passed there would be no requirement that states carry on the service. Congressman Stokes referred to the Amendment as "tanta-

mount to a constitutional amendment outlawing abortions for the poor." 123 Cong. Rec. H. 6085 (June 17, 1977). Congressman Holtzman said that it "condemns to death poor women, who, if they give birth, will die . . . ." *Id.* at H. 6092. Others spoke to the same point, *see, e.g., id.* at H. 6097 (Congressman Meyner), 123 Cong. Rec. at H. 10968 (Congressman Sears), *id.* at H. 12656 (Congressman Fraser).

The predictions were no less dismal in the Senate. Senator Packwood said: "Let us be very clear about it. If we do not fund abortions, these 250,000 to 300,000 women who now receive abortions, paid for by Federal or State moneys under medicaid, are either going to have babies they do not want or are going to go to backroom abortionists. There is no question that the poor are going to be discriminated against." 123 Cong. Rec. at S. 11031 (June 29, 1977). Similar remarks were made by Senator McGovern, *id.* at S. 11040; Senator Bayh, *id.* at S. 11043; Senator Brooke, 123 Cong. Rec. at S. 13672 (Aug. 4, 1977); and Senator Javits, 123 Cong. Rec. at S. 19443 (Dec. 7, 1977).

Another variant of the message was that, if the Amendment were passed, the states would have the option to provide abortion on more liberal terms than those contained in the Amendment, but only if they wished to do so. Congressman Russo, a supporter of the Amendment, after expressing satisfaction over the prospect of "saving" 240,000 more lives if the source of funds were eliminated, said, "of course, eliminating Federal funds would not end all Government financing of all abortions. States would retain the option of providing money to poor women for abortions if they want. But the Federal Government's example would encourage States participating in the medicaid program to discontinue this aspect of medical care to the poor—an option States cannot exercise at the present

time." 123 Cong. Rec. H. 6097-6098 (June 17, 1977). Other spokesmen to the same effect were Senator Helms, 123 Cong. Rec. S. 18584-18585 (Nov. 3, 1977); Congressman Early, 123 Cong. Rec. at H. 10835 (Oct. 12, 1977); and Congressman Smith, 123 Cong. Rec. at H. 12653 (Dec. 6, 1977).

Finally, the total absence in the debate of any suggestion that massive financial burdens were being shifted to the states further belies plaintiffs' contention that states were to continue to fund abortions beyond those qualifying under the Hyde Amendment. Indeed, were a state to undertake to pick up the burden dropped by the federal government and divert funds from other medical services, the functioning of its entire plan would be crippled.

From this sampling—which we think is a fair representation of the entire Congressional debate—we are persuaded that Congress realized that it was using the unusual and frowned upon device of legislating via an appropriations measure to accomplish a substantive result. That result was, it believed, far more significant than the proscription of federal funding of a program mandated by Medicaid to continue even if only with state funding.

Repeal by Implication

Plaintiffs contend that this reading of the Hyde Amendment brings it into conflict with the Medicaid Act and thus violates both the principle that we should endeavor so to construe two statutes that they may be capable of coexistence, "absent a clearly expressed congressional intention to the contrary", *Morton* v. *Mancari,* 417 U.S. 535, 551 (1974), and the equally prominent principle disfavoring repeals by implication, especially repeals via appropriations measures, *Tennessee Valley Authority* v. *Hill,* 98 S. Ct. 2270, 2299-2300 (1978).

As a preliminary matter, we agree that our construction of the Amendment, as a substantive enactment of a state's

Medicaid obligations, produces a conflict with the Medicaid Act. We have held that the Medicaid Act requires an inquiry into whether a state plan which limits reimbursement for certain services, does so in a way that is "reasonable", "consistent with the objectives of the Act", 42 U.S.C. § 1396a(a) (17) and without discriminating solely on the basis of the particular "diagnosis, illness or condition", 42 C.F.R. § 440.230 (1978), and we do not believe that a state plan, funding only those abortions specified in the Hyde Amendment, would be consistent with these requirements of the Act.[8] The Hyde Amendment does not suffer from the defect of the Massachusetts Act by limiting the availability of funds, except in cases of rape and incest, to life and death situations. Such a discrimination, we determined, could not reasonably be said to be one based on medical need. *See White* v. *Beal, supra,* 555 F.2d at 1151-52. Nor does the Hyde Amendment reduce the role of the physician to making professional judgments based solely on prevention of the woman's death, as does the Massachusetts Act. We think it important, in terms of its consistency with the Act, that the Hyde Amendment permits funding for abortions needed to prevent "serious and long-lasting physical health damage", a standard that allows a physician's consideration of health needs, short of life and death. The requirements that the damage be "severe" and "long-lasting" apparently are designed to ensure that funds will in fact be reserved to those who most need the treatment.

Thus far, we might feel that we should conclude that

[8] Had we concluded, as did the district court, that the Medicaid Act required a state to provide all "medically necessary" services as determined by a physician, the conflict between the Amendment and Medicaid would be readily apparent and far ranging. The narrow categories funded by the Hyde Amendment would certainly not encompass all situations in which a physician, exercising his professional judgment, could certify that an abortion was medically necessary.

the Hyde Amendment, if intended as a substantive statement on a state's obligations, was in no way repugnant with the Medicaid Act's requirements for state plans. However, we are troubled by the Amendment's requirement that the damage be to *physical* health, impliedly excluding abortions needed to prevent severe and long-lasting *mental* health damage. This distinction, if embodied in a state plan, would seem to contravene the Medicaid Act's mandate that a state may not "deny . . . a required service . . . solely because of the diagnosis, type of illness or condition." 42 C.F.R. § 440.230 (1978). Such a discrimination carried to the point of total denial of abortion services when serious injury to a person's mental health if the pregnancy is carried to term is diagnosed, cannot, we believe, be considered to be based on medical need. *Id.* The discrimination sets up a presumption that physical health damage is always more serious and hence more important to prevent than mental health damage, a presumption that is nothing less than absurd.[9] It follows, without further

[9] In *Graves* v. *Fisher,* 361 F. Supp. 1356 (D. Me. 1972), *aff'd,* 412 U.S. 924 (1973), a three-judge court, including members of this court, construed requirements imposed on the states by Title XVI of the Social Security Act analogous to those of Title XIX, the Medicaid Act. It held that Maine had violated the Social Security Act and regulations thereunder by excluding a "category of applicants for disability assistance on the basis of the source of the diagnosed impairment", *id.* at 1359, in particular, persons "suffering solely from psychoneurotic disorders, regardless of severity or permanence". *Id.* at 1357. Although the state in that case had imposed limits on *eligibility* for medical assistance, and we are concerned with attempts by a state to restrict the medical assistance that it provides to eligible recipients, the court's reasoning is equally pertinent here:

> "If an applicant can prove that his disability is the functional equivalent of that of other persons receiving assistance, the source of or medical definition of his disability should be irrelevant. . . . [T]he reference in 42 U.S.C. § 1382 (a)(13) to 'reasonable standards . . . for determining eligibility, cannot be construed as a license to states to introduce eligibility conditions which relate neither to the duration nor to the degree of an applicant's impairment." *Id.* at 1359.

See Boisvert v. *Zeiller,* 334 F. Supp. 403 (D. N.H. 1971).

elaboration, that we could not describe it as "reasonable" or "consistent with the objectives of the Act" to withhold treatment in this fashion. 42 U.S.C. § 1396a(a)(17).[10]

Contrary to plaintiffs' assertions, this conclusion does not compel us to embrace their reading of the Amendment as a mere withdrawal of federal monies. Although that reading may permit the Hyde Amendment and the Medicaid Act to co-exist facially by effecting no change in the Act's requirements for state plans, it requires us to do violence to the Medicaid Act on a more pervasive and fundamental level than would result from reading the Amendment as a substantive alteration of those requirements. The Medicaid program is one of federal and state cooperation in funding medical assistance; a complete withdrawal of the federal prop in the system with the intent to drop the total cost of providing the service upon the states, runs directly counter to the basic structure of the

[10] Whether the legislators realized that they had come into conflict with the Medicaid Act's requirements by so legislating, or believed that the Hyde Amendment, although legislative in impact, was consonant with the Act, we cannot say with certainty. At one point in the debate, several members appeared to suggest that their particular versions of the Amendment were consonant with the Act's requirements. *See* 123 Cong. Rec. S. 11048, 11051 (Senators Schweiker and Brooke). For example, Senator Brooke, arguing for payment for all abortions deemed medically necessary by a physician, stated that "['Medically necessary'] are words of art that are used throughout medical legislation. They are used for all social security funds and for all medical funds." *Id.* at S. 11051. Perhaps we could infer an intent to repeal portions of the Medicaid Act from the fact that the Congress enacted a far more restrictive bill than one which, at least according to Senator Brooke, would be consistent with the Act. We do not believe, however, that we need find express statements in the debates that the Amendment would conflict with the Act; it is enough that the natural result of the clearly expressed intent to legislate was to create a "positive repugnancy" between its restrictions and provisions of the Medicaid Act. Such a repugnancy itself suggests the intent to repeal. *See Morton* v. *Mancari*, 417 U.S. 535, 550 (1974); *United States* v. *Borden Co.*, 308 U.S. 188, 198-99 (1939); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936).

program[11] and could seriously cripple a state's attempts to provide other necessary medical services embraced by its plan.

Moreover, the principle that two statutes should if possible be found capable of co-existence does not suggest that we should approach the statute with blinders and reconcile them at all costs, even when the second enactment is an appropriations measure. *Tennessee Valley Authority* v. *Hill*, *supra*, which plaintiffs have so vigorously invoked as indicating that either express or implied repeal of Medicaid is unthinkable, is not authority to the contrary. Indeed, our analysis of the factors which distinguish that case from the one at bar indicates that our construction of Congressional intent is proper. *Tennessee Valley Authority* v. *Hill*, *supra*, involved an unsuccessful argument that the continued appropriating of funds for the Tellico Dam repealed by implication the Endangered Species Act insofar as that Act would otherwise have required construction of the dam to be held up because of the fact that the snail darter and its habitat would be placed in jeopardy. The elements in that case were (1) brief statements of opinion of committee members in a lengthy report, that (2) monies in a very large appropriation act should be used to complete a dam, (3) although the act itself did not identify the approved objects of expenditure, and (4) the act supposedly repealed pro tanto lay in the jurisdiction of another committee. The Court had no difficulty

[11] In *McRae* v. *Mathews*, 421 F. Supp. 533, 538 (E.D. N.Y. 1976) (vacated and remanded on other grounds), *see* note 6 *supra*, Judge Dooling rejected the argument that the Hyde Amendment, for FY 1977, had not altered a state's obligations to fund abortions required by the Medicaid Act because:

> "The argument overlooks the essential nature of the Medicaid legislation. The state and federal governments are linked in a fiscal partnership to provide for medical assistance to the needy; the program is based on the federal initiative, and the funding is primarily federal (42 U.S.C. §§ 1396, 1396d(b))."

in observing that since legislators are entitled to assume that appropriated funds are to be "devoted to purposes which are lawful", 98 S. Ct. at 2300, there was no basis to suppose that they felt any conflict between funding the dam and the Endangered Species Act. It also noted that there was "no indication that Congress as a whole was aware of [the committees'] views", *id.*, that "the appropriations committees had no jurisdiction over the subject matter of endangered species", *id.*, and that the "appropriations Acts did not themselves identify the projects for which the sums had been appropriated." *Id.* at 2299 n. 35.

Here, in contrast, the objective was a solitary, specific proscription, not a hidden permitted purpose among a multitude; and the appropriation related completely to the subject matter of the affected substantive legislation. In *United States* v. *Dickerson*, 310 U.S. 554 (1940), the Court faced a situation more apposite to that at bar. Congress had enacted a proviso, appended to an appropriations bill, that none of the funds appropriated therein were to be used for payment "of any enlistment allowance for 're-enlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of sections 9 and 10' of the Act of June 10, 1922." *Id.* at 555. The Court concluded that Congress had intended to suspend the enlistment allowance authorized by § 9 and not merely to restrict the use of federal funds for that purpose. *Id.* at 561. It refused to limit its analysis to the "plain and unambiguous" language of that statute and turned to the legislative history which clearly showed Congressional intent to legislate by an appropriations bill. *Id.* at 559-62.

Furthermore, the legislative history which we have turned to in resolving this case does not suffer from the defects noted by the *Tennessee Valley Authority* v. *Hill* Court. The statement of Congressional intent upon which we rely is not embodied in appropriations committee re-

ports, which represent merely the views of its members and may never have come to the attention of Congress as a whole. The heated and lengthy debates that led to passage of the numerous versions of the Hyde Amendment took place on the floor of each house, and the views expressed were those of a wide spectrum of its members.

We recognize the force of our brother's dissent, that a court should not infer lightly that Congress has legislated in an appropriations measure so as to repeal a prior enactment, a legislative process that contravenes its rules, and that Congress has not, in so many words, stated that the Hyde Amendment repeals portions of the Medicaid Act. But we are unable to view this six month intensive debate —albeit an emotional one—as a mere exercise in cost-shifting. To so conclude ignores statement after statement by proponents and opponents of the Amendment that its passage would allow states to choose whether to fund more abortions than those specified therein and that it would affect drastically the lives of poor women by closing off their access to these services. Such a conclusion ignores as well the unquestionably explicit awareness by the legislators that they were using the disfavored vehicle of an appropriations measure to legislate this result and that they were setting aside their rules to do so. Indeed, were these expressions of Congressional intent held to be insufficient in quantity or quality to legislate substantively, we would in candor be forced to admit that legislation in appropriations acts was, as a practical matter, out of the question. Such a determination, regardless of our view of the wisdom of the course chosen by the legislature, is clearly beyond the proper scope of this court.

We hold that the legislative history of the Hyde Amendment is consistent with the cooperative federal-state structure of the Medicaid Act and reveals that the Amendment constituted a substantive policy decision concerning the

public funding of abortions which left the states free to fund more abortions than those for which federal funds were made available by the Amendment, but did not require them to do so. The Medicaid Act, to the extent of its repugnancy with the Hyde Amendment, has therefore been altered by the Amendment. *See United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939).

Our analysis has differed from that of the district court in this case, most importantly, in our conclusion that the Medicaid Act does not mandate that a state provide all medically necessary services as determined by the physician. The result is the same, however, for we determined that the Massachusetts Act violates even our less expansive standard, that the limitation on services be "reasonable", "consistent with the objectives of the Act", and not based "solely . . . [on] the diagnosis, type of illness or condition". 42 U.S.C. § 1396a(a)(17); 42 C.F.R. § 440.230. Furthermore, our decision that the Hyde Amendment was intended as more than a cost-shifting device is consistent with the district court's conclusion on this issue.

The judgment of the district court therefore is affirmed, enjoining implementation of Stat. 1978, ch. 367, § 2, Item 4402-5000, insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment. This result is in accord with the state's request that, should an injunction issue, it be modified to allow operation of Chapter 367 consistent with the requirements of the Medicaid Act. The district court properly did not reach the constitutional arguments raised by the parties, because it had statutory grounds for decision. *Hagans* v. *Levine*, 415 U.S. 528 (1974). We now remand the case for consideration of the constitutional questions that remain open—namely, whether the Hyde Amendment, construed as a substantive alteration of the Medicaid Act and thus requiring the states to

establish plans that provide abortion services in no more than those instances which are specified in the Hyde Amendment, is constitutional.

On remand the district court should also afford the plaintiffs who were dismissed from the *Parent's Aid Society, Inc.* v. *Sharp* actions for lack of standing an opportunity to be heard on the standing issue. Although a court may dismiss an action at its own instance, as apparently happened here, it must first afford the parties an opportunity to oppose the dismissal. *See Literature, Inc.* v. *Quinn*, 482 F.2d 372, 374 (1st Cir. 1973).

It is so ordered.

BOWNES, *Circuit Judge* (dissenting). I respectfully dissent.

While I have no problem with my brethren's analysis as to the requirements that the Medicaid Act imposes on a participating state, I cannot agree that the Hyde Amendment has worked a substantive change in those requirements.

The Hyde Amendment was a rider attached to a general appropriations bill for the fiscal year 1978. In addition to making funds available for the Departments of Labor and Health, Education and Welfare, appropriations were made for such disparate purposes as continuing projects and activities as would be available in the District of Columbia Appropriations Act, the Advisory Neighborhood Commissions and the Disaster Loan Fund of the Small Business Administration. Section 209 of Pub. L. 95-205; 91 Stat. 1460 (Dec. 9, 1970).

The language of the paragraph in which the rider was inserted is important:

> Such amounts as may be necessary for projects or activities provided for in the Departments of Labor,

and Health, Education, and Welfare, and Related Agencies Appropriations Act, 1973 (H.R. 7555), at a rate of operations, and to the extent and in the manner, provided for in such Act, notwithstanding the provisions of Sec. 106 of this joint resolution: *Provided, That none of the funds provided for in this paragraph* shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced.

Id. (emphasis added).

There is nothing in the language of the proviso suggesting that Congress intended to repeal the Medicaid Act in part. The Hyde Amendment specifically addresses itself to the use of federal funds. The words are clear: "*Provided,* that none of the funds provided for in this paragraph . . . ." The usual rule of statutory construction is to start with the words of the statute; if they are clear, there is no need to go further.

> When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Ex parte Collett,* 337 U.S. 55, 61 (1949), and cases cited therein. Here it is not *necessary* to look beyond the words of the statute. We have undertaken such an analysis only to meet Mr. Justice Powell's suggestion that the "absurd" result reached in this case, post, at 1, is not in accord with congressional intent.

TVA v. *Hill,* 46 U.S.L.W. 4673, 4681 n.29 (June 15, 1978).

Although my brethren recognize that the language of the Hyde Amendment speaks only to the use of federal funds, they feel that an extensive excursion into legislative history is necessary because its plain meaning produces a result at variance with the policy of the legislation as a whole. This is a bootstrap approach to statutory construction; it allows a court to ignore the plain language of a statute and rewrite it by drawing upon its legislative history. While congressional debates and committee reports can be a helpful guide to the intent of an ambiguously worded statute, they should not be used to defeat the clearly expressed statutory language. The majority opinion cites *United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 543-44 (1939), in support of the doctrine that, when the plain meaning of a statute produces a result "plainly at variance with the policy of the legislation as a whole," it is necessary to delve into legislative history. But there is no "legislation as a whole" to consider here. We have an amendment attached to a general appropriations bill. This, of course, is a prime example of why the courts should be and are extremely reluctant to allow a rider to an appropriations bill to amend an entirely separate and distinct statute by implication. *See* extended discussion in *TVA* v. *Hill, supra,* 46 U.S.L.W. at 4683-85. Our own observation in *Mass. Fin. Serv.* v. *Securities Investor Protection,* 545 F.2d 754, 757-58 (1st Cir. 1976), cited in the majority opinion, is pertinent:

> It is not our province to decide whether Congress would have been wiser to draft the SIPC legislation

so as to include firms like MFS as members, *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U.S. 183, 195-96, 57 S.Ct. 139, 81 L.Ed. 109 (1936), and it is no part of our function to extend a statute's reach beyond its clearly indicated scope. *Guiseppi* v. *Walling*, 144 F.2d 608, 614-15 (2d Cir. 1944) (Frank, J.) *aff'd sub nom. Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945). Rather, "[i]t is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great Northern Ry.*, 343 U.S. 562, 575, 72 S.Ct. 985, 993, 96 L.Ed. 1142 (1952). Congress remains free to amend SIPA should it so choose, but as it now stands that act clearly exempts MFS.

But, even assuming that the legislative history is relevant, I can find nothing in the majority's excellently researched and documented history of the debate on this highly emotionally charged subject that clearly indicates that Congress was doing more than limiting the use of federal funds. There were, as my brethren point out, two separate statements, by Congressman Doran and Edwards, to the effect that only federal funds were involved. The majority concludes, however, that these observations were nullified by those portions of the debate in both the House and Senate that focused on the effect of the amendment on the poor, *i.e.*, by Congressman Stokes, Meyner, Sears and Fraser and Senators Packwood, McGovern, Bayh, Brooke and Javits. But the statements of Congressmen Doran and Edwards were never expressly refuted.

My brethren state that "the record is clear that both houses of Congress were acutely conscious that they were engaging in substantive legislation." If this is so, it is hard to understand the absence of any statement during the course of the lengthy debate that the Hyde Amendment was making a significant change in the Medicaid Act.

Surely, someone in the Congress would have been perceptive enough and forthright enough to realize the full implications of the amendment and say so. It is not as clear to me as it is to my brethren that Congress intended a *pro tanto* amendment of the Medicaid Act. The majority opinion points to the absence from the debate of any discussion of the financial effects on the states of being forced to fund abortions that are determined to be medically necessary as further evidence of an intended substantive change in the Medicaid Act. It may also, of course, indicate that Congress was so emotionally enveloped in this volatile and disruptive subject that it failed to think through the implications of what it was doing. In any event, we cannot construe silence on a subject as a positive expression of congressional intent.[1]

We have here a statute whose plain meaning is clear and whose congressional history can be construed to mean that a number of congressmen felt that, contrary to what the statute said, it would effect a substantial change in the Medicaid Act. If this were merely a matter of balancing the words of the statute against the words of the debate, this would be a close case, but the principle disfavoring repeal by implication and Congress' own procedural rules expressly prohibiting changing existing law via an appropriations bill, apply with particular pertinence here and compel a finding that there was no substantive amendment of the Medicaid Act.

The majority's attempt to distinguish this case from *TVA* v. *Hill*, *supra*, rests on the grounds that full-fledged and lengthy congressional debate is a better gauge of congressional intent than a committee report. As I noted

[1] The suggestion in the majority opinion that funding by a state alone of medically necessary abortions could cripple a state's attempts to provide other necessary medical services in its plar is not buttressed by any facts or figures in the record or the con gressional history.

before, however, the subject matter of the debate is an important factor to consider. It would not be inaccurate to say that the more emotional the subject, the less sure we can be that the words used reflect considered thought rather than expressing deeply ingrained feelings. I cannot, as does the majority, ignore the clear teaching of *TVA* v. *Hill, supra.*[2]

> The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." *Committee for Nuclear Responsibility* v. *Seaborg,* 149 U.S. App. D.C. 380, 382, 463 F.2d 783, 785 (1971) (emphasis added); *Environmental Defense Fund* v. *Froehlke,* 473 F.2d 346, 355 (CA 8, 1972). This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an appropriations act. We recognize that both substantive enactments and appropriations measures are "acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively

[2] *TVA* v. *Hill,* 46 U.S.L.W. 4673 (June 15, 1978), is merely the latest in a long line of cases holding that repeals by implication are not favored. *See, e.g., United States* v. *Continental Tuna Corp.,* 425 U.S. 164, 168-69 (1976); *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 456-57 (1945); *United States* v. *Borden Co.,* 308 U.S. 188, 198-99 (1939); *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936).

> the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need. House Rule XXI(2), for instance, specifically provides:
>
> > "No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provision in any such bill or amendment thereto changing existing law be in order.*" (Emphasis added.)
>
> See also Standing Rules of the Senate, Rule 16.4. Thus, to sustain petitioner's position, we would be obliged to assume that Congress meant to *pro tanto* repeal § 7 of the Act by means of a procedure expressly prohibited under the rules of Congress.

Id. at 4683.

The majority cites *United States* v. *Dickerson,* 310 U.S. 554 (1940), to buttress its position that in rare cases where congressional intent is clear, an amendment to an appropriations bill may effect a change in existing law. In *Dickerson,* the Congress did amend a reenlistment allowance statute by a provision tacked on to an appropriation for the Rural Electrification Administration. But the language used in the appropriations rider specifically referred to the other statute and explicitly suspended its provisions for the fiscal year in question. *Dickerson* is, therefore, a very narrow exception to the established rule. Here, there is no clear amendment of the Medicaid Act in the appropriation proviso and, at the least, some ambiguity in the congressional history as to what Congress really intended.

I am also troubled by my brethren's treatment of what is to me a clear signal in *Beal* v. *Doe,* 432 U.S. 438., 444-45 (1977):

> Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a State to refuse to fund *unnecessary*—though perhaps desirable—medical services.

I read this language as a cautionary instruction to the states that, while they would still be within the parameters of the Medicaid Act if they eliminated unnecessary medical services, they would transgress the statutory scheme by precluding necessary medical services from coverage. Which is precisely the situation we confront.

Another factor militating against the result reached by the majority is Congress' own rules. As pointed out in *TVA* v. *Hill, supra,* both houses of Congress have a rule that expressly prohibits changing existing law by an amendment to an appropriation bill. There is scant mention in the congressional debate of these rules or the fact that both houses intended to flout them.[3] Are we to assume that Congress deliberately evaded and ignored its own procedural rules, or forgot about them, or was entirely ignorant of them? The only logical conclusion that gives due deference to Congress' knowledge and respect for its own procedural requirements is that the Hyde Amendment was limited to the use of federal funds only.

The majority opinion focuses on the congressional debate and finds in it a clear intent to amend the Medicaid Act by allowing the states to limit necessary medical services for abortion to those specifically set forth in the Hyde Amendment.[4] This approach in my opinion distorts the

[3] Senator Magnuson did state that the amendment should not be part of an appropriations bill, but did not advert to the Senate rule. Senator Stennis adverted, somewhat obliquely, to the "obscure rules" of the Senate.

[4] As the majority points out, the requirement that the damage to the mother be limited to physical health, excluding any mental health damage, is directly contrary to the specific provisions of the Medicaid Act that medical services may not be denied "solely because of the diagnosis, type of illness or condition." 42 C.F.R. §449.10(a)(5)(i) (1977) [recently recodified as 42 C.F.R. §440.230, 43 Fed. Reg. No. 190 (Sept. 29, 1978)]. *See also* 42 U.S.C. §1396a(a)(10)(A), (C). Rather than reading this language as a repeal by implication of the Medicaid Act, I would read "physical" as surplusage and strike it, leaving "health" standing alone. This construction would permit both statutes to be read in harmony one with the other. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari,* 417 U.S. 535, 551 (1974).

picture. A complete perspective requires a careful look at all of the factors involved: the words of the statute, the congressional history, the rules of the Congress prohibiting substantive changes in existing law by an amendment to an appropriations bill, and the well established principle against repeal by implication, especially by an amendment to an appropriations bill.

Even if the congressional intent were as clear as the majority finds, I do not think that it should be allowed to ride roughshod over firmly established and, at least up until now, well understood congressional rules and judicial principles of statutory construction. I would hold that the Hyde Amendment is limited, as it clearly says, to the expenditure of federal funds and that the medically necessary requirements of the Medicaid Act still apply to the states. While the result may be "anomalous," that is a matter for Congress, not the courts. To quote again from *TVA* v. *Hill, supra,* at 4684:

> We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "commonsense and the public weal." Our Constitution vests such responsibilities in the political Branches.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1027

EDWARD J. KING,
GOVERNOR OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,
v.
PRETERM, INC., ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Motion to Dismiss or Affirm.

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In the Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1027.

EDWARD J. KING,
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APPELLANTS,

v.

PRETERM, INC., ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Motion to Dismiss or Affirm.

Pursuant to Rule 16 of the Rules of this Court, Preterm, Inc., Stanton P. Goldstein, M.D., Shiao-Yu Lee, M.D., Jane Doe, Jane Doe II, Massachusetts Welfare Recipients for Welfare Reform, and the Planned Parenthood League of Massachusetts move that the appeal by the Governor of the Commonwealth of Massachusetts, its Secretary of Administration

and Finance, its Secretary of Human Services, and its Commissioner of Public Welfare be dismissed. In the alternative, appellees move that the judgment of the United States Court of Appeals for the First Circuit be affirmed.

Questions Presented.

1. Whether this appeal should be dismissed for lack of jurisdiction because it was not taken within the time prescribed by law as required by Rule 11.

2. Whether the questions presented by this appeal are substantial where the Court of Appeals decision was carefully reasoned and consistent with all prior decisional law on both the appellate and district court levels construing the Social Security Act in general and the significance of identical restrictions on Medicaid funding of abortions in particular.

Statement of the Case.

The defendants-appellants (hereinafter "defendants"), public officials of the Commonwealth of Massachusetts, seek to appeal from a "series of orders" entered "at various times" by the United States Court of Appeals for the First Circuit (Jurisdictional Statement, p. 3). The first order is an injunction pending appeal entered by the court of appeals in August, 1978. The second is the judgment and order of the court of appeals entered January 15, 1979, affirming the decision of the district court. The third is an order entered by the court on August 2, 1979, amending the language of its prior orders to include a later enacted statute which continued the restrictions previously enjoined by the court.

On July 13, 1978, the plaintiffs brought this action in the United States District Court for the District of Massachusetts challenging a Massachusetts law restricting the expenditure of public funds to pay for abortions under its Medicaid program. The complaint alleged that the restriction, which was contained in a rider to the 1978 Medicaid appropriation, was invalid under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, and the United States Constitution. Plaintiffs moved for a preliminary injunction requiring the defendants to pay for abortions which had been determined by a physician to be medically necessary. On July 28, 1978, the district court entered an order granting in part and denying in part plaintiffs' request for preliminary relief (decision reported *sub nom. Jaffe* v. *Sharp*, 463 F. Supp. 222 (D. Mass. 1978)). The plaintiffs promptly appealed and moved, pursuant to Rule 8, F. R. A. P., for an injunction pending appeal in the United States Court of Appeals for the First Circuit.

On August 7, 1978, two judges of the court of appeals entered an order granting the temporary relief requested by the plaintiffs pending appeal, enlarging the scope of the injunction that had been entered by the district court.[1] The defendants took no appeal at that time.

On January 15, 1979, the court of appeals affirmed the district court's ruling on the plaintiffs' statutory claims and remanded the case to the lower court for consideration of the constitutional claims. *Preterm, Inc.* v. *Dukakis*, 591 F. 2d

[1] The district court had found that c. 367 violated the requirements of Title XIX by failing to provide for medically necessary abortions, but declined to order the defendants to pay for Medicaid abortions other than those for which federal reimbursement would be available under the provisions of the Hyde Amendment. The court of appeals entered an order modifying the order of the district court to require the defendants to provide funding for all medically necessary abortions (pending the disposition of the appeal).

121 (1st Cir. 1979).[2] The members of the panel unanimously concluded that the Massachusetts law restricting the expenditure of state funds for abortion was inconsistent with the requirements of Title XIX. (It is this part of the court's ruling which the defendants attack in this appeal). Two judges, however, agreed with the district court that the Hyde Amendment, P.L. 95-205, § 209, 91 Stat. 1460, had modified the substantive requirements of the Medicaid statute. The plaintiffs' motion for rehearing was denied by the court on February 2, 1979. The mandate was stayed, however, to permit the plaintiffs to file a petition for a writ of certiorari, and the injunction entered August 7, 1978, was specifically continued in force.

The plaintiffs timely filed a petition for a writ of certiorari in this Court, seeking review of the second part of the ruling of the court of appeals.[3] The defendants did not appeal from that decision within the time allowed by law.

On May 14, 1979, certiorari was denied. On the following day, the plaintiffs filed an application for suspension of the order denying certiorari pending the filing and disposition of a petition for rehearing. On May 18, 1979, the Circuit Justice granted the motion, and on June 18, 1979, a petition for rehearing was timely filed.

While the petition for rehearing was pending before this Court, the Massachusetts legislature enacted two additional

[2] While the appeal was pending before the court of appeals, the defendants, with the assent of the plaintiffs, filed a motion seeking consolidation of the preliminary injunction hearing with the hearing on the merits, which motion was granted on September 6, 1978.

[3] The basis for the defendants' opposition to the granting of certiorari is telling: they objected to certiorari on the grounds that the court of appeals' decision did not fully dispose of all issues, since it concerned only the statutory claims and not the constitutional issues (which were remanded to the district court).

restrictions on funding for abortions under the state's medical assistance program. The first was an amendment of the General Laws permanently prohibiting the use of state funds to pay for an abortion which is not necessary to prevent the death of the mother. Mass. St. 1979, c. 268, § 1. The second was a rider to the fiscal 1980 Medicaid appropriation which continued, and even expanded, the restrictions on abortion funding which had been adopted the previous year, and invalidated by the court of appeals. Mass. St. 1979, c. 393, § 2, Item 4402-5000. After the plaintiffs unsuccessfully sought assurances from the defendants that the new restrictions would not be implemented, they filed a motion in the court of appeals seeking a clarification, or, in the alternative, a technical modification of the court's August 7, 1978, order making explicit its applicability to the 1979 legislation.[4]

On August 2, 1979, the court of appeals entered a technical order, which substituted the title of the 1979 appropriations rider for the title of the 1978 appropriations rider in its previous orders. Noting that the defendants had conceded in their submission to the court of appeals that the 1979 appropriations rider conflicted with the court's judgment in *Preterm, Inc.* v. *Dukakis* and with the August 7, 1978, injunction, the court of appeals "found no reason not to add to its mandate" the 1979 appropriations rider. The court declined, however, to include Mass. St. 1979, c. 268, § 1, which was not yet in force, within its order at that time.

On August 20, 1979, over seven months after the judgment of the court of appeals, the defendants filed a notice of appeal purporting to appeal under 28 U.S.C. § 1254(2) from the August, 1978, injunction, the January 15, 1979, judgment affirm-

[4] The plaintiffs were compelled to seek interlocutory relief in the court of appeals for the simple reason that the case was currently before that court and its injunction remained in full force and effect pending final action on the petition for rehearing by this Court.

ing the decision of the district court and the August, 1979, modification of the previous orders.

On October 1, 1979, this Court denied the plaintiffs' petition for rehearing of the denial of their petition for a writ of certiorari.

On October 3, 1979, the defendants sought an order in this Court extending the time for docketing their appeal until ninety days after the final disposition of the unresolved claims in the district court or, in the alternative, until December 28, 1979.[5] On October 16, 1979, the Circuit Justice entered an order extending the time for docketing the appeal until December 30, 1979.

The plaintiffs now move the Court to dismiss the appeal as an untimely attempt to obtain review of the January 15, 1979, judgment of the court of appeals. Alternatively, they move the Court to affirm the judgment of the court of appeals on the ground that it is clearly correct.

[5] There were two grounds for the request: one a misapprehension that the plaintiffs' petition was still pending, and the other, the defendants' desire to have all claims — statutory and constitutional — reviewed at the same time, a position which plaintiffs now share:

> Having filed their notice in order to protect their right to appellate review eventually in this Court, respondents continue to maintain that this Court's consideration of this case should await the District Court's final disposition of the petitioner's constitutional claims. . . . For this reason respondents continue to oppose the petition for certiorari which the full Court denied on May 14, 1979, and petitioner's motion for rehearing (which awaits disposition). *Motion for Order Permitting Postponement of Further Appellate Proceedings.*

Argument.

I. The Appeal Should be Dismissed for Lack of Jurisdiction Because it was Not Taken Within the Time Prescribed by Law as Required by Rule 11.

On its face, the appeal from the January 15, 1979, judgment and order of the court of appeals affirming the decision of the district court is plainly untimely. 28 U.S.C. § 2101(c) requires that the appeal be taken within ninety days of the entry of the judgment or decree. The time for filing a notice of appeal is absolute and may not be enlarged. *Territo* v. *New York*, 358 U.S. 279 (1959); *Taggart* v. *New York*, 392 U.S. 667 (1967); *Charger Investments, Inc.* v. *Corbett*, 429 U.S. 877 (1976); *Gabriel* v. *United States*, 429 U.S. 877 (1976). Here, the order affirming the decision of the district court was entered on January 15, 1979, and the petition for rehearing was denied on February 2, 1979, but it was not until August 20, 1979, that the defendants filed their notice of appeal.[6]

While the appeal from the August 2, 1979, order amending the order of August 7, 1978, and the judgment of January 15, 1979, may have been timely, this appeal is not concerned with that order. The issues noted by the defendants in their jurisdictional statement are those decided in the January 15, 1979, judgment of the court of appeals — whether the court of appeals was correct in ruling on that date that the Commonwealth's limitation on Medicaid abortions was consistent with Title XIX and whether the remedy ordered at that time was proper.

[6] This conclusion is unaffected by the Court's order enlarging time for docketing the appeal. For, while there may be no enlargement of time for the taking of an appeal, pursuant to Rule 11 and § 2101(c), there may be an enlargement of time to docket the appeal (and file the jurisdictional statement) under Rule 16(1).

The August 2, 1979, order on the contrary, concerned purely technical matters. It was entered pursuant to the plaintiffs' request for clarification. It simply added to the court's previous orders the newly enacted statute. Even the defendants conceded that there was no question that the new enactment conflicted with the court's judgment in *Preterm, Inc.* v. *Dukakis*.

A nonsubstantive amendment cannot revive a dormant appeal. In *Federal Trade Commission* v. *Minneapolis Honeywell Co.*, 344 U.S. 206 (1952), the FTC failed to petition for certiorari from an entry of judgment by the court of appeals dismissing count III of the FTC complaint. Instead, the Commission submitted a memorandum asking that counts I and II of its cross petition, which had not been challenged on the appeal, be sustained. The court then issued an order, labelled "Final Decree," dismissing count III (as it had done in the first order) and affirming counts I and II. It was only after the second order that the FTC petitioned for certiorari on the issue of the dismissal of count III. The Court ruled the petition untimely:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance or resolves a genuine ambiguity in a judgment previously rendered should the period within which an appeal must be taken . . . begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. 344 U.S. at 248-49.[7]

[7] The case law has articulated what constitutes "matters of substance" or the circumstances under which there is a "genuine ambiguity" but have not affected the underlying rule. *See Federal Trade Commission* v. *Colgate Palmolive*, 380 U.S. 374 (1965) (second mandate in fact clarified a genuine ambiguity in the *reasoning* of the first decision); *United States* v. *Adams*, 383 U.S. 39 (1966) (second decision dealt with a *discrete*, separate issue, not raised in the first).

In the instant case, the defendants, by admitting that the 1979 enactment conflicted with the court of appeals' prior judgment, have also conceded that the August 2, 1979, order did not "disturb" or "revise" any "legal rights and obligations" already settled by the decision in *Preterm, Inc.* v. *Dukakis*. It simply extended the settled "legal rights and obligations" to a subsequent condition, a new enactment. Plainly, if the state chooses to implement a law which it knows to be invalid it cannot benefit from the fact to revive a previously extinguished claim. In any case, the issues which the defendants seek to review were not affected by the August 2, 1979, amendment. They concern the obligations set up by the January 15, 1979, judgment and the August 7, 1978, order.[8]

II. The Decision of the Court of Appeals with Respect to the Scope of Title XIX is Both Carefully Reasoned and in All Respects Consistent with the Decisions of the Overwhelming Majority of District Courts and Courts of Appeals that have Considered this Issue, and with Dicta of this Court.

The members of the panel of the First Circuit unanimously concluded that the Massachusetts law restricting the expend-

[8] It should also be noted that the August 2, 1979, order is not a final order within the meaning of *Slaker* v. *O'Connor*, 278 U.S. 188 (1929). The policies underlying the final judgment rule — to avoid piecemeal appeals — would not be met if this appeal were allowed to stand. One small portion of the plaintffs' statutory claim (the remainder of which had been covered by plaintiffs' petition for a writ of certiorari) would be before this Court. Significant constitutional claims are still pending before the district court. It is plain from all of the submissions of the defendants that even they did not intend this result.

iture of state funds for abortions was inconsistent with the requirements of Title XIX. Contrary to the defendants' assertions, that finding was based upon a careful analysis of the language of the statute, its supporting regulations, the prior decisional law construing the requirements of Title XIX, and, most strikingly, the decisions of the vast majority of district courts and courts of appeals that have considered this precise issue.

The court found that abortions generally fit within the mandatory items which the state must provide under 42 U.S.C. § 1396a(a)(13)(c). Medically necessary abortions cannot be carved out of the required services since to do so would violate certain specific statutory and administrative standards and an extensive case law. Restricting funding to abortions necessary to save the life of the woman (and thereby excluding medically necessary abortions) cannot be justified in terms of the goals of the statute (42 U.S.C. § 1396a(a)(17)), the best interests of the recipients (42 U.S.C. § 1396a(a)(19)), or the requirement that services be equally distributed (42 U.S.C. § 1396a(a)(10)). It cannot be justified in terms of medical necessity (42 C.F.R. § 442.10(a)(5)(i)). It is plainly a prohibited exclusion based on "diagnosis, type of illness or condition" (42 C.F.R. § 442.10(a)(5)(i)).

Moreover, such an exclusion is inconsistent with the holdings of cases construing Title XIX, notably *Rush* v. *Parham*, 440 F. Supp. 383 (N.D. Ga. 1977), *White* v. *Beal*, 555 F. 2d 1146 (3d Cir. 1977), and with dicta in this Court's decision in *Beal* v. *Doe*, 432 U.S. 438, 440 n.1 (1977). Finally, the Court's holding — that the Massachusetts restriction violates the terms of Title XIX — is consistent with the decisions of nine other courts — on all levels, throughout the country. *Coe* v. *Dirkswager*, No. 3-79 Civ. 56 (D. Minn. August 9, 1979); *Doe* v. *Busbee*, No. C79-786A (N.D. Ga. December 13, 1979); *Doe* v. *Percy*, 476 F. Supp. 324 (D. Wis. 1979); *Emma G.* v.

Edwards, No. 77-1342 (E.D. La. November 27, 1978); *Hodgson* v. *Board of County Commissioners*, No. 79-1665 (8th Cir. January 9, 1980); *Planned Parenthood Affiliates of Ohio* v. *Rhodes*, 477 F. Supp. 529 (D. Ohio 1979); *Reproductive Health Services* v. *Freeman*, Nos. 79-1275, 79-1346 (8th Cir. January 9, 1980); *Roe* v. *Casey*, 464 F. Supp. 487 (E.D. Pa. 1978); *Smith* v. *Ginsberg*, No. 75-0380C4 (S.D. W. Va. 1978); *Zbaraz* v. *Quern*, 596 F. 2d 196 (7th Cir. 1979); *cf. D . . . R . . .* v. *Mitchell*, No. 78-1675 (10th Cir. October 25, 1979).[9]

III. The Court's Order Enjoining the Defendants from Enforcing the Challenged Statutes to the Extent More Restrictive than the Hyde Amendment is Consistent with Previous Decisions of this Court and the Requirements of Massachusetts Law.

According to the defendants, rather than enjoining the application of the challenged statute insofar as it was inconsistent with the Hyde Amendment, the court of appeals should have remanded to give the state an opportunity to choose between amending the state law provisions in conformity with the

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[9] The defendants' reliance on the 1960 Kerr-Mills amendments to Title I of the Social Security Act, 74 Stat. 924, is wholly misplaced. The statute at issue here is the 1965 Act which was specifically enacted to cure the deficiencies of Kerr-Mills. One key goal of the 1965 Act was to improve the quality and scope of medical care for the needy by establishing for the first time minimum requirements on the scope of services provided by the states. Under Kerr-Mills, participating states had only to provide "some institutional and noninstitutional care," rather than the five mandatory services of 42 U.S.C. § 1396a(a)(13). The legislative history of the 1965 statute addresses itself particularly to these inadequacies and efforts to provide minimum mandatory federal requirements. Report of House Committee on Ways and Means on H.R. 6075, H. Rep. 213, March 29, 1965, p. 9; Report of the Committee on Finance of the U.S. Senate, Rept. 404, Part 1, June 30, 1965, pp. 9, 80.

federal law, or opting out of the federal program. The argument is without merit. As the court noted, although the state's participation may be voluntary, once it chooses to participate it must do so consistent with the requirements imposed by the Medicaid Act. *Preterm, Inc.* v. *Dukakis*, 591 F. 2d 121, 124 (1st Cir. 1979). The responsibility of the court is to define the federal requirements and order compliance therewith. If the state chooses to withdraw, that option is always available to it. *Quern* v. *Mandley*, 436 U.S. 725 (1978).[10]

In any event, Massachusetts state law requires a Medicaid program and requires that the state harmonize its provisions with Title XIX. G. L. c. 118E, §§ 1 and 6. Requiring the court to remand to give the defendants an opportunity to opt out of this program, would have been pointless in view of their obligations under state law.

[10] The defendants' reliance on *Rosado* v. *Wyman*, 397 U.S. 397 (1970), is misplaced, since what was at issue in *Rosado* was the method of computing welfare benefits because the incremental cost to the state was potentially massive, and because there was no "discrete and severable" provision whose enforcement could be enjoined. 397 U.S. at 421. There is no such problem in the instant case.

Conclusion.

For the reasons stated above, the plaintiffs request that the Court dismiss the instant appeal, or, in the alternative, affirm the decision of the Court of Appeals for the First Circuit.

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